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CLAREMONT McKENNA COLLEGE

ONE NATION, ONE PEOPLE, ONE POWER?

RE-EVALUATING THE ROLE OF THE FEDERAL PLENARY POWER IN IMMIGRATION

SUBMITTED TO

PROFESSOR GEORGE THOMAS

AND

DEAN GREGORY HESS

BY

ALEXANDRA SASLAW

FOR

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Introduction

One of the most prominent issues currently facing the Supreme Court is the legitimacy of state immigration laws, the most famous of which is Arizona's Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.¹ Similar laws also passed in Georgia, Alabama, and South Carolina. While far fewer "copycat" laws passed than originally predicted, states which have implemented such laws face intense controversy.² These laws create state crimes relating to illegal immigration which range from requiring Arizona police officers to investigate drivers' immigration status during traffic stops to compelling Alabama public schools to collect similar information about all of their students.³ Similar spates of state legislation aimed at illegal immigrants have emerged in both the mid-2000s and the early 1990s.

These efforts have been both lauded and lamented by the media and legal scholars. Much of the public discussion has focused on the policy implications of individual provisions of the laws. Concerns about racial profiling have been particularly strong in Arizona, where the law requires only a vague "reasonable suspicion" as grounds for a mandatory check of immigration status.⁴ But these are primarily policy concerns. The major question before the Supreme Court is the constitutional role of the states in writing immigration law.

¹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010).

² A. Elena Lacayo, *One Year Later: A Look at SB 1070 and Copycat Legislation* (Washington, DC: National Council of La Raza, 2011), http://www.nclr.org/index.php/publications/one_year_later_a_look_at_sb_1070_and_copycat_legislation/ (accessed April 9, 2012).

³ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010); Hammon-Beason Alabama Taxpayer and Citizen Protection Act, *Alabama Laws Act 2011-535* (2011).

⁴ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2.

When the United States Department of Justice submitted a motion for preliminary injunction against SB 1070, its attorneys claimed that “the Constitution vests the political branches with exclusive and plenary authority to establish the nation’s immigration policy.”⁵ Since the late nineteenth century, the federal government has maintained almost unlimited power over immigration law. According to the Supreme Court, control over immigration was inherent in the nation’s goal of “preserv[ing] its independence, and giv[ing] security against foreign aggression and encroachment.”⁶ By granting this authority to the federal government, the Court also triggered an era of judicial deference which is still underway today. Federal immigration laws are rarely struck down by the Court, even when similar state laws violate equal protection analysis. This level of federal autonomy and authority is exceedingly rare, and has led to “anomalies, and even barbarities”⁷ which would be impermissible in any other legislative context.

In its motion, the Justice Department cites several sections of the Constitution as evidence of its immigration supremacy. These sections include Article 1, Section 8, Clause 3 (Congress can “establish an uniform Rule of Naturalization”); Article 1, Section 8, Clause 2 (Congress may “regulate Commerce with foreign Nations”); and Article 2, Section 3 (the President may “take Care that the Laws be faithfully executed). According

⁵ Plaintiff’s Motion for Preliminary Injunction, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 3.

⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889)

⁷ Gerald L. Neuman, “The Lost Century of American Immigration Law (1776-1875),” *Columbia Law Review* 93, no. 8 (Dec. 1993), 1839, <http://www.michiganlawreview.org/assets/pdfs/106/4/rodriguez.pdf>(accessed March 10, 2012).

to the motion, this authority enabled Congress “to enact[] and refine[] a detailed statutory framework governing immigration.”⁸

But these citations are insufficient to explain the scope of the federal government’s immigration authority. Each of the referenced clauses only tangentially relates to the modern corpus of immigration and alienage law. Congress has an enumerated power to regulate naturalization, but modern immigration law runs the gamut from border control to employment regulation to welfare policy, each of which goes above and beyond determining citizenship. It is difficult to argue that the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which restricts legal aliens’ access to welfare, is part of a uniform rule of naturalization. Given that it influences welfare systems in individual states, PRWORA is barely (if at all) related to foreign commerce.

In fact, Matthew Lindsay, an American legal historian, argues that the Constitution not only fails to confer immigration authority directly onto Congress – it also lacks “any evidence that the Framers contemplated” granting the power to the legislature.⁹ In fact, for the first one hundred years after the American Revolution, immigration was controlled almost exclusively by the states.¹⁰ While Congress passed “An Act to establish an uniform Rule of Naturalization” in 179,¹¹ it did not pass a statute

⁸ Plaintiff’s Motion, 702 F. Supp. 980 (D. Ariz. 2010), 3.

⁹ Matthew J. Lindsay, “Immigration as Invasion, Sovereignty, Security, and the Origins of the Federal Immigration Power,” *Harvard Civil Rights – Civil Liberties Law Review* 45, no. 1 (Winter 2010), 9, <http://harvardcrcl.org/wp-content/uploads/2009/06/1-56.pdf> (accessed July 15, 2011).

¹⁰ Neuman, “The Lost Century.”

¹¹ An Act to establish an uniform Rule of Naturalization, U.S. Statutes at Large 1 (1790): 103-104.

regulating entrance into the country –a major component of immigration law – for another century.¹²

At first, the Supreme Court relied on the foreign commerce clause to preempt immigration laws at the state level. By the end of the nineteenth century, however, the Court relied on the nature of sovereignty to justify the federal government’s right to dominate immigration policy. Often, the Court determined that sovereignty granted the federal government a “plenary power” over immigration which even the judicial branch could not question. In the decisions which created this authority, it is often treated as a given; in reality, it emerged after one hundred years of state-controlled immigration. Therefore, the doctrine should be treated with skepticism.

The series of cases which established federal plenary authority were largely motivated by two factors: national security and national identity. In *Chy Lung v. Freeman*, one of the foundational immigration cases in the late 19th century, the Court overturned a California immigration law which refused entry to certain undesirable classes of immigrants, out of fear that “a single State... at her pleasure, [could] embroil us in disastrous quarrels with other nations.”¹³ Federal control over immigration was viewed as an essential component of protecting the country and its relations with foreign nations.

Of course, *Chy Lung* and its brethren were also motivated by claims of racial inferiority. The plenary power doctrine was established during a significant wave of

¹² *An Act to Regulate Immigration, U.S. Statutes at Large* 22 (1875): 214.

¹³ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)

immigration from Asia, and overt racism is evident in both Court opinions and the Congressional Record.¹⁴ The same Court who decided *Plessy v. Ferguson* was also responsible for the early plenary power cases. While it may be unfair to judge the Court by modern standards, any analysis of immigration precedent cannot ignore the context of these decisions, especially when plenary authority has been used to discriminate on the basis of alienage.¹⁵

The plenary power was also established when immigration law looked significantly different than it does today. Over time, immigration law has subsumed portions of other areas of public policy, including employment and welfare. In the latter half of the twentieth century, a series of cases carved out a niche for state involvement in regulating aliens. In 1976, *De Canas v. Bica*, the Court upheld a state statute which sanctioned employers for hiring undocumented workers. The Court's opinion created a distinction between immigration law and alienage law, and found that states can pass laws which impact undocumented aliens, so long as they are rooted in an area which historically falls under the states' police powers. Pure immigration law, which involves aliens' entry into the country and the conditions for their removal, is presumed to be the exclusive domain of the federal government.

This dichotomy did not put the issue to rest, however. Hiroshi Motomura, a professor of immigration and citizenship law at UCLA School of Law, argues that the two categories cannot be easily distinguished anymore since one form of law often serves

¹⁴ Gabriel J. Chin, "Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration," *UCLA Law Review* 46, no. 1 (1998), <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1121119> (accessed February 11, 2012).

¹⁵ *Mathews v. Diaz*, 426 U.S. 67 (1976).

as a proxy for the other.¹⁶ Today, the federal government often exercises plenary authority over alienage law as well as immigration law. For example, Congress enacted the Immigration Reform and Control Act (IRCA) in 1986 which explicitly preempted states from creating employment schemes regulating aliens except through “licensing and similar laws.”¹⁷ The IRCA linked employment law, traditionally a domestic concern, with immigration law, thus further degrading the line between alienage and immigration law.

By conflating immigration and alienage law and devolving discretion in welfare benefits, the federal government has expanded the scope of the plenary power. Originally, the nearly limitless federal authority was justified as a matter of national security. Current immigration law focuses primarily on the possible economic impact of an influx of unskilled labor. Given the new focus of immigration law, many of the justifications for the plenary power are untenable.

The domestication trend can also be seen in welfare law, which has raised the question of whether Congress can devolve its largely unrestricted authority to the states. PRWORA granted states the right to discriminate on the basis of citizenship when allocating benefits – an act which the Supreme Court had previously decided violated the equal protection clause of the Fourteenth Amendment when states attempted it on their

¹⁶ Motomura, Hiroshi, “COMMENT: Immigration and Alienage, Federalism and Proposition 187,” *Virginia Journal of International Law* 35 (Fall 1994), <http://www.jstor.org/stable/1123443> (accessed March 2, 2012).

¹⁷ *Immigration Reform and Control Act of 1986*, Public Law 99-603, § 101(h)(2), *U.S. Statutes at Large* 100 (1986): 3359, codified at U.S. Code 8, §1324a(h)(2).

own.¹⁸ This devolution has granted immense discretion to the states and expanded the plenary power even further.

As Juliet Stumpf, an immigration and citizenship law scholar, points out, “[d]omesticating immigration law muddies the existing equal protection dichotomy under which federal alienage laws receive rational basis review while state alienage laws usually trigger strict scrutiny.”¹⁹ According to Stumpf, combining limited judicial review with states’ police powers will “doubly disadvantage”²⁰ both legal and illegal aliens. This perilous progression has highlighted the potential consequences of the plenary power, especially when married with state police powers.

Despite these potential dangers, support for the plenary power has enjoyed a resurgence in response to increased state interest in regulating immigration and immigrants. Recent state laws demonstrate a general dissatisfaction with federal control of immigration laws. Arizona even indicated their desire to create a new immigration policy of “attrition through enforcement” for the entire state.²¹ So long as immigration’s economic impact is unevenly distributed throughout the country, certain states are going to continue to press for a right to enter the immigration arena.²² These states are not attempting to override the plenary power altogether; instead, they are developing theories

¹⁸ *Graham v. Richardson*, 403 U.S. 365 (1971)

¹⁹ Juliet P. Stumpf, “States of Confusion: the Rise of State and Local Power over Immigration,” *North Carolina Law Review* 86 (2008), 1606, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157552 (accessed July 17, 2011).

²⁰ Stumpf, “States of Confusion,” 1617.

²¹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 1.

²² Peter J. Spiro, “The States and Immigration in an Era of Demi-Sovereignities,” *Virginia Journal of International Law* 35 (1994-1995), <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/vajint35&div=14&id=&page=> (accessed July 20, 2011).

which incorporate federal supremacy but permit state legislation. The consequence of these efforts is the increased risk of a “patchwork” of immigration laws throughout the country, depending primarily on the Supreme Court’s decision about SB 1070.

As states continue to push for a right to regulate immigrants, it becomes increasingly important to abandon the commitment to the plenary power and to adopt a higher level of scrutiny for all domestic immigration law. Immigration law no longer applies only to entry into the country – it now encompasses every element of aliens’ lives within the United States. Regardless of their immigration status, these persons deserve protection from unfair laws regardless of where they originate. The current level of discretion granted to the federal government fails to provide this protection.

In order to establish a fair and viable system of immigration law in the United States, we must abandon the plenary power except in very particular circumstances, and begin to look seriously at ideas of immigration federalism. Otherwise, the rights of both legal and illegal immigrants exist only at the whim of the federal government. While it may be easier to rely on the plenary power in the face of controversial state legislation, it is important to recognize that the doctrine is dangerous and outdated. A new scheme of legislation, based on balancing competing values of innovation, individual rights, uniformity, and security, is much better suited to the modern immigration context.

Chapter 1: The Evolution of the Plenary Power

Justice Blackmun, writing for the majority in *Kleindienst v. Mandel* in 1972, asserted that “[u]ntil 1875 alien migration to the United States was unrestricted.”¹ Blackmun then presented a series of federal immigration statutes, pointing to a “pattern... of increasing control” over the excludability of certain classes of aliens.”² But Blackmun’s history of American immigration policy is incomplete. It simply repeats what Gerald Neuman, a professor of international and comparative law at Harvard Law School, calls the “pervasive myth” in immigration scholarship:³ that the entry of immigrants was unregulated until the late nineteenth century. This falsehood contributes to the belief that the federal government should have exclusive control over immigration law. In reality, the historical progression of immigration legislation counters this claim. Not only can states theoretically play a role in regulating aliens’ entry into the country, but they already have in the past.

Early Immigration Law

Originally, immigration-related laws in America were enacted by the states. These laws were intended to limit the entry of undesirable populations, and addressed concerns

¹ *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

² 408 U.S. 753, 761, 761-762 (1972).

³ Gerald L. Neuman, “The Lost Century of American Immigration Law (1776-1875),” *Columbia Law Review* 93, no. 8 (Dec. 1993), 1833, <http://www.jstor.org/stable/1123006> (accessed November 10, 2011).

about crime, public health, poverty, slave status, and race.⁴ These laws generally related to the police powers of the state, and were in fact, according to Stumpf, “one of the first opportunities for the fledgling states to flex their newfound sovereign powers.”⁵

Many of these laws did not explicitly distinguish on the basis of national citizenship, and are difficult to recognize as immigration law. For example, a 1637 Massachusetts law instructed towns to reject any stranger “who intended to reside there without official permission”⁶ regardless of their nationality. After 1794, however, strangers were permitted to settle if they met certain criteria – which almost always included American citizenship.⁷ Consequently, aliens were “permanently subject to deportation”⁸ as long as they remained in Massachusetts. In effect, such laws created the first border control schemes in the United States.

The earliest federal regulations of immigration were treaties. In 1794, the United States signed the Jay Treaty which allowed British and Native American people entrance into the country via Canada.⁹ These foreign policy-oriented regulations existed simultaneously with state laws through most of the century. Federal statutory regulations of immigration were nonexistent until after the Civil War. Until that point, states were the gatekeepers. In fact, state poor laws were so widely accepted that Congress refused to

⁴ Mark S. Grube “Preemption of Local Regulations Beyond *Lozano v. City of Hazleton*: Reconciling Local Enforcement With Federal Immigration Policy,” *Cornell Law Review* 95 (January 2010), <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Grube-final.pdf> (accessed July 6, 2011).

⁵ Juliet P. Stumpf, “States of Confusion: the Rise of State and Local Power over Immigration,” *North Carolina Law Review* 86 (2008), 1567, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157552 (accessed September 12, 2011).

⁶ *Ibid.*, 1566.

⁷ Neuman, “The Lost Century,” 1848.

⁸ *Ibid.*, 1852.

⁹ Stumpf, “States of Confusion,” 1569.

legislate in the area until 1882.¹⁰ When federal legislation was proposed in the mid-nineteenth century, Congress refused to pass it, primarily out of deference to states' rights.¹¹ Similarly, federal legislation did not include laws around the prevention of contagious disease until 1891 because the government deferred to state statutes to control contagion.¹² Eventually, however, federal officials began to question the role of the states in controlling immigrants' entry into the United States.

Foreign Commerce Justification

In the first half of the nineteenth century, challenges to state immigration and alienage laws relied on Congress' exclusive authority over foreign commerce. This authority, rooted in Article I, Section 8, Clause 3 of the United States Constitution, was clarified in *Gibbons v. Ogden* to include all forms of intercourse. Justice Marshall wrote that this power "comprehends navigation within the limits of every state in the Union, so far as that navigation may be connected with commerce, with foreign nations or among the several states."¹³ These early challenges were not always successful, however.

New York v. Miln

In 1824, New York legislators passed "an act concerning passengers in vessels arriving in the port of New York" which required shipmasters to present a roster of their vessel's passengers to the Mayor of New York. Failure to make such a report resulted in a \$75 fine per passenger. The law came before the Supreme Court in 1837 in *New York v.*

¹⁰ Neuman, "The Lost Century," 1859.

¹¹ Ibid, 1859.

¹² Ibid, 1860.

¹³ *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

Miln, in which the defendant claimed that the statute “assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void.”¹⁴ White, the defendant’s attorney, pointed out during oral argument that the law was not merely a poor law, but one “which affects the navigation of all countries, as connected by their commerce with this country.”¹⁵

The attorney for New York City claimed that the act was a constitutional poor law aimed at protecting the city from foreign paupers. He claimed that the “power of determining how and when strangers are to be admitted is inherent in all communities.”¹⁶ According to New York, this aspect of sovereignty could not be co-opted by the federal government. In the majority opinion, Justice Barbour sided with the state of New York. Skirting the question of whether the states were able to regulate commerce, the majority determined that “the act [was] not a regulation of commerce, but of police.”¹⁷ Barbour specified that the law was intended to protect the state from the possibility of immigrants becoming public charges. Since the law took effect after the passengers landed, the Court determined it was unrelated to foreign commerce. The Court believed it was

“... as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise...”¹⁸

¹⁴ *New York v. Miln*, 36 U.S. 102, 131 (1837).

¹⁵ Petition, *New York v. Miln*, 36 U.S. 102, 116 (1837),

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=36&invol=102> (accessed November 10, 2011).

¹⁶ *Ibid*, 110.

¹⁷ 36 U.S. 102, 132 (1837).

¹⁸ 36 U.S. 102, 142 (1837).

But the decision was not a foregone conclusion. Justice Story wrote a spirited dissent, claiming that “the act in controversy is... an act which assumes to regulate trade and commerce between the port of New York and foreign ports.”¹⁹ Moreover, Story noted, though states have the right to pass quarantine and poor laws, they cannot use a regulation of foreign commerce to achieve those goals. Story believed New York overstepped its boundaries, and even claimed that the late Chief Justice John Marshall, who had heard the oral arguments, agreed that the act was unconstitutional.

Passenger Cases

A decade later, when the Court examined two immigration regulations from New York City and Boston, they took the foreign commerce power more seriously.²⁰ An 1837 Boston law required shipmasters to pay two dollars for each of their passengers in order to defray the costs to the state should the passenger end up as a public charge.²¹ A similar New York law, passed in 1797, taxed passengers arriving in the city; the funds helped finance a hospital, as well as programs to reform juvenile delinquents.²²

In 1849, the Court considered these laws in *Norris v. Boston* and *Smith v. Turner*, frequently referred to as the *Passenger Cases*. By a five-four vote, the Court declared these “head taxes” unconstitutional.²³ No majority opinion was authored, and therefore the cases fail to provide clear precedent. Though nonbinding, the *Passenger Cases* reveal the prevailing viewpoints of the era. Justices McLean, Wayne, and

¹⁹ 36 U.S. 102, 15 (1837) (dissenting opinion).

²⁰ *Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

²¹ Neuman, “The Lost Century,” 1850.

²² *Ibid*, 1861.

²³ 48 U.S. (7 How.) 283 (1849).

McKinley pointed to the foreign commerce power afforded Congress in *Gibbons* as proof that the laws at issue were unconstitutional. The remaining two justices in the majority failed to comment on the commerce clause at all. Each state's decision to charge a tax on foreign vessels was considered "repugnant to the Constitution and laws of the United States, and therefore void."²⁴

Interestingly, the *Passenger Cases* hinted at the future direction of immigration legislation. Justice Catron, who had ignored the foreign commerce power, noted that the vessel "was undoubtedly regulated by... our treaty with Great Britain of 1815."²⁵ This extension of the Jay Treaty permitted British subjects free entry into the United States. Catron believed that due to this treaty, and similar agreements with other countries, were incompatible with the laws being considered. The focus on foreign policy in Cantor's opinion serves as a preview for later Supreme Court cases on immigration.

Henderson v. Mayor of City of New York

As a consequence of the Passenger Cases, New York rewrote the law to allow for an alternative scheme: instead of paying one dollar by default, shipmasters could choose between paying the fee and securing a bond for each passenger.²⁶ This new formulation, which required captains to arrange the bonds within twenty-four hours of landing, was addressed in *Henderson v. Mayor of City of New York* in 1876.²⁷ Since

²⁴ 48 U.S. (7 How.) 283, 573 (1849).

²⁵ 48 U.S. (7 How.) 283, 439 (1849).

²⁶ Neuman, "The Lost Century," 1856.

²⁷ *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875).

the *Passenger Cases* lacked clear precedent, Miller aimed to “attain[] a unanimity not found” in previous decisions.²⁸

First, the Court determined that the law in question involved a tax. Justice Miller stated that a statute’s purpose “must be determined by its natural and reasonable effect.”²⁹ Given the alternative to paying a fee was the “heavy and almost impossible condition” of securing \$300 bonds for each passenger, Miller believed the effect was to charge each master a per-passenger fee.³⁰ The majority also noted that if New York’s goal was to protect the state against pauperism, “it is a strange mode of doing this to tax every passenger alike who comes from abroad.”³¹ Those who contributed to the wealth of the state were subject to the same tax as the feared paupers.

To Miller, the scope of the police power was irrelevant to the decision because it could not justify entering an arena which belongs exclusively to Congress. He conceded that often “the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.”³² But the Court is often charged with making difficult, precise decisions, and Miller found the act unconstitutional because of its connection to foreign commerce.

Notably, foreign relations concerns were also prevalent in *Henderson*. Miller claimed that a statute which creates difficult conditions of foreign commerce “must of

²⁸ 92 U.S. 259, 270 (1875).

²⁹ 92 U.S. 259, 268 (1875).

³⁰ 92 U.S. 259, 268 (1875).

³¹ 92 U.S. 259, 269 (1875).

³² 92 U.S. 259, 272 (1875).

necessity be national in its character.”³³ The Court believed that these statutes “ought to be, the subject of a uniform system or plan.”³⁴

Chy Lung v. Freeman

That same year, Justice Miller wrote for the majority in *Chy Lung v. Freeman*.³⁵ The case involved a California statute which resembled the one in New York except that it required a bond only for certain types of passengers, including any noncitizen who belongs to a certain class, including people who are “lunatic, idiotic, deaf, dumb, blind, crippled, or infirm... or is likely to become a public charge... or is a convicted criminal, or a lewd and debauched woman.”³⁶ The plaintiff was one of twenty Chinese women detained upon reaching San Francisco who was singled out as a “lewd and debauched woman” by the Commissioner of Immigration.³⁷ The shipmaster refused to give the required bond, and the women were left in custody in San Francisco to await the return of the vessel to remove them from the United States.

The statute also authorized the commissioner to charge numerous fees for examining passengers and preparing the bonds. The alternative to this scheme was to pay a sum of money determined by the Commissioner, who in turn keeps twenty percent of the collected money. The Court argued that

“[i]t is hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign

³³ 92 U.S. 259, 273 (1875).

³⁴ 92 U.S. 259, 260 (1875).

³⁵ *Chy Lung v. Freeman*, 92 U.S. 259 (1875).

³⁶ 92 U.S. 259, 259 (1875).

³⁷ 92 U.S. 275, 276 (1875).

trade...from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.”³⁸

Whereas *Henderson* only tangentially touched on foreign policy concerns, *Chy Lung* places substantial importance on the possible consequences of California’s actions. Miller expresses fear that “a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.”³⁹ More specifically, the entire United States would pay for the actions of a single individual in one state.

Miller argued that the Constitution forbids states from participating in foreign relations, and therefore it is unlikely that it would permit states to act in a way which might create problems on a national scale. Instead, the Court believed that the power to control immigration, due to its connection to foreign affairs, should belong exclusively to Congress. California’s statute was a regulation of immigration, rather than of police, because its end goal was to increase the general treasury.

In *Chy Lung*, the Court made no mention of foreign commerce. Instead, immigration was assumed to belong exclusively to the federal government because of its ability to inspire international conflict. The fear of state immigration regulations

³⁸ 92 U.S. 275, 278 (1875).

³⁹ 92 U.S. 275, 279 (1875).

embroiling the nation in conflict was a major justification for federal plenary authority in the immigration arena – and the argument is still being used against SB 1070.⁴⁰

As a consequence of the Supreme Court's invalidation of state head taxes, New York and other ports began to lobby Congress to control the influx of immigrants arriving in the late nineteenth century.⁴¹ In 1875, the history of federal immigration legislation truly began with the Page Act, which prohibited involuntary Asian immigration into the United States.⁴² Under this law, ships could be inspected for violations of the law.

This lobbying also led to an 1882 immigration act in which the federal government imposed its own fifty-cent-per-person tax on noncitizens arriving at American ports. Entitled “An act to regulate Immigration,” the statute mandated that collected taxes be paid into the United States Treasury to be used “to defray the expense of regulating immigration... and for the care of immigrants arriving in the United States, for the relief of such as are in distress.”⁴³ It also permitted commissioners to refuse the landing of certain classes of immigrants, including lunatics and public charges. Under this act, the Secretary could choose to enter into contracts with state officers, who could enforce the taxation policy.

⁴⁰ Ian Millhiser, “Bipartisan Former State,” Think Progress, entry posted March 29, 2012, <http://thinkprogress.org/justice/2012/03/29/455122/bipartisan-former-state-defense-department-officials-warn-justices-that-sb-1070-harms-foreign-policy/?mobile=nc> (accessed April 9, 2012).

⁴¹ Matthew J. Lindsay, “Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power,” *Harvard Civil Rights – Civil Liberties Law Review* 45, no. 1 (Winter 2010), <http://harvardcrcl.org/wp-content/uploads/2009/06/1-56.pdf> (accessed July 18, 2011).

⁴² Gabriel J. Chin, “Chae Chan Ping and Fong Yue Ting: The Origins of the Plenary Power,” in *Immigration Stories*, ed. David Martin and Peter Schuck (New York: Foundation Press, 2005).

⁴³ *An Act to Regulate Immigration, U.S. Statutes at Large* 22 (1875): 214.

The constitutionality of this federal head tax was addressed in the *Head Money Cases* two years later. A unanimous opinion, crafted by Justice Miller, upheld the law as a rightful use of Congress' power over "that branch of foreign commerce which is involved in immigration."⁴⁴ Moreover, Miller believed that Congress must hold the ability to pass such laws because otherwise would imply

"that the ships of all nations, including our own, can, without restraint or regulation, deposit here... the entire European population of criminals, paupers, and diseased persons without making any provision to preserve them from starvation and its concomitant sufferings..."⁴⁵

In order for the United States to protect itself from these unsavory elements, the Court believed Congress must be able to regulate the entrance of immigrants – even in direct contravention of government treaties.

The Plenary Power Justification

Chae Chan Ping v. United States

In 1882, Congress also passed "[a]n act to execute certain treaty stipulations regarding the Chinese." Better known as the Chinese Exclusion Act, the law prohibited Chinese laborers from immigrating to the United States for a period of ten years. While laborers still retained privileges to come and go, they were required to carry certain

⁴⁴ *Head Money Cases*, 112 U.S. 580, 595 (1884).

⁴⁵ 112 U.S. 580, 593 (1884).

registration documents from the government to ensure their re-entry into America.⁴⁶ The Scott Act extended the restrictions on Chinese immigrants. That act, which passed in 1888, forbade any Chinese laborer who had departed from the United States to return, regardless of his or her residency.⁴⁷ Any preexisting registration documents were “declared void and of no effect.”⁴⁸

Chae Chan Ping was a Chinese immigrant who had resided in the United States, and had left the country with a reentry certificate in 1887. During his journey back to the United States, the Scott Act voided his documentation. The initial trial was decided within a week of Ping’s landing; the Circuit Court found that the statute applied retroactively, and therefore Ping was no longer permitted to land in the country.⁴⁹ The case reached the Supreme Court where it became known as *The Chinese Exclusion Case*.

Writing for a unanimous Court, Justice Field affirmed the lower court’s decision against Ping. In his opinion, Field addressed the source of Congress’ power to pass the Scott Act. He claimed that regulating immigration is an inherent part of a nation’s sovereignty. According to Field, the main responsibility of any nation is “[t]o preserve its independence, and give security against foreign aggression and encroachment.”⁵⁰ In order to protect itself from “aggression and encroachment,” a sovereign nation must possess the

⁴⁶ Chin, “Origins of the Plenary Power,” 3.

⁴⁷ The Scott Act of 1888, 50th cong., 1st sess., 25 Stat 476 (October 1, 1888).

⁴⁸ Ibid.

⁴⁹ Chin, “Origins of the Plenary Power.”

⁵⁰ 130 U.S. 581, 606 (1889).

ability to respond to the threats against “peace and security” created by the existence of foreigners on national soil.⁵¹

Field also reiterated the need for a uniform regulation of immigration, a topic which Miller addressed tangentially in *Henderson*. The opinion emphasized the need for national unity in foreign relations, stating that

“[f]or local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”⁵²

The vision of immigration legislation presented in the *Chinese Exclusion Case* leaves little, if any, authority to state and local governments. It also grants unending authority to Congress in responding to threats from foreigners, even in peacetime. With this opinion, Field created the doctrine of a federal plenary power over immigration which persists in modern times, granting the United States previously unprecedented control over noncitizens arriving on American soil.

Fong Yue Ting v. United States

When the original Chinese Exclusion Act was set to expire, Congress passed the Geary Act which extended and expanded restrictions on Chinese immigrants. The act was entitled “[a]n act to prohibit the coming of Chinese persons into the United States” – as Gabriel Chin, , a professor of immigration law at University of Arizona, pointed out,

⁵¹ 130 U.S. 581, 606 (1889).

⁵² 130 U.S. 581, 606 (1889)

the use of the word “person” in place of the prior standard of laborer meant the law encompassed a much broader group of Chinese immigrants.⁵³

In addition to extending the prior limits for another ten years, the law imposed greater burdens on Chinese immigrants. It declared any Chinese person removable unless he “shall establish, by affirmative proof... his lawful right to remain in the United States.”⁵⁴ Unlawfully present Chinese people could be subjected to imprisonment, hard labor, and deportation. The Act also created a registration scheme; all Chinese residents were required to register themselves with the state within one year or their presence would be considered illegal.⁵⁵

In May 1893, Fong Yue Ting, Wong Quan, and Lee Joe were arrested for failure to register with the collector of internal revenue and sentenced to be deported.⁵⁶ That year, the Supreme Court decided on the case with six justices in the majority and three dissenting opinions. Justice Gray, who wrote for the majority, opened by stating that “[t]he right of a nation to expel or deport foreigners... rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”⁵⁷ Control over the admittance and expulsion of aliens is “an inherent and inalienable right of every sovereign and independent nation.”⁵⁸

Gray noted that the power to regulate immigration belonged solely to Congress, and was to be executed by the executive branch. In his view, the courts had little

⁵³ Chin, “Origins of the Plenary Power.”

⁵⁴ The Geary Act, 1892, ch. 60, 27 Stat 25 (May 25, 1892).

⁵⁵ Chin, “Origins of the Plenary Power.”

⁵⁶ *Ibid.*

⁵⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 606 (1893).

⁵⁸ 149 U.S. 698, 711 (1893).

authority to interfere. According to Gray, “the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress” about immigration.⁵⁹ This viewpoint can be seen in the pattern of judicial deference in the following century. For example, in the 1970s, the Supreme Court permitted the federal government to discriminate on the basis of alienage when distributing welfare benefits – even though it determined that a similar statute by the states violated the equal protection rights of legal aliens.⁶⁰ By allowing the judicial branch no role in immigration policy, Gray broadened the scope of the plenary power.

Three dissenting justices rejected this claim, and each expressed concern about the implications of such wide-reaching power. Even Justice Field, who had authored the opinion in *Chae Chan Ping* permitting the United States to refuse entry to a returning alien, balked at the idea of deporting Fong Yue Ting. Field and the other dissenters distinguished the case because it involved the deportation of people already present in the United States rather than refusal of re-entry. Each dissenting justice believed that during deportation proceedings, even aliens deserved some constitutional protections which did not exist outside the borders of the United States.⁶¹ Field felt that “being of an infamous character, [deportation] can only be imposed after indictment, trial, and conviction.”⁶²

Moreover, the dissenting justices were concerned that the scope of the power was too great. Justice Brewer asked in his dissent “where are the limits to such powers to be

⁵⁹ 149 U.S. 698, 731 (1893).

⁶⁰ *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Mathews v. Diaz*, 426 U.S. 67 (1976).

⁶¹ Chin, “Origins of the Plenary Power.”

⁶² 149 U.S. 698, 759 (1893) (dissenting opinion).

found, and by whom are they to be pronounced?”⁶³ Field felt that the power to deport, unlike the power to exclude, was not plenary and noted that it “has never been asserted... except for crime, or as an act of war.”⁶⁴ Though dissenting opinions do not establish precedent, they indicate that the expansive plenary power was not a monolithic decision by the Court. In fact, judicial deference in the immigration arena was developed by a slim 5-4 majority.

Motivations for the Plenary Power

For the past century, immigration law has been considered an important element of national security. In *Fong Yue Ting*, Justice Gray argued that controlling immigration was “essential to [America’s] safety, its independence, and its welfare.”⁶⁵ This idea has permeated immigration precedent. In 1952, the Court determined that the federal government should have wide latitude in regulating immigration because “any policy toward aliens is vitally and intricately interwoven with... the conduct of foreign affairs, the war power, and the maintenance of a republican form of government.”⁶⁶ In *Fong Yue Ting*, the Supreme Court limited its own role because of the connection to foreign affairs and national security. Likewise, states have largely been shut out of the immigration policy arena for this reason.

Though largely accepted as the correct source of the plenary power, this viewpoint fails to explain why states originally controlled immigration or why the Court initially viewed it as a Commerce Clause issue. Less than before *Chae Chan Ping*

⁶³ 149 U.S. 698, 737 (1893).

⁶⁴ 149 U.S. 698, 746 (1893) (dissenting opinion).

⁶⁵ 149 U.S. 698, 711 (1893).

⁶⁶ *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-590 (1952).

established the plenary power, Justice Miller argued that the immigration statutes at issue in the *Head Money Cases* were “highly beneficial to the poor and helpless immigrant, and... essential to the protection of the people in whose midst they are deposited.”⁶⁷ His opinion made no explicit mention of sovereignty or national security.

Obviously, national sovereignty is not the full story. These transformations should be viewed as a consequence of the country’s social and political context at the end of the nineteenth century. The transition was part of a process of national self-definition. Hiroshi Motomura explains that “immigration decisions give citizens the chance to choose new citizens and decide who ‘we’ are as Americans.”⁶⁸ When attitudes towards immigration and immigrants changed at the end of the nineteenth century, so did the rationale behind federal control. The major impetuses for this change were the reorganization of labor and racial prejudice against Chinese immigrants. Looking into the ideological context which led to the federal government’s exceptional authority over immigration brings into doubt its legitimacy today, and is thus a necessary exercise when considering the legitimacy of the plenary power.

Lindsay argues that for most of American history, immigrants were considered “desirable additions,” because of a belief that they could be assimilated to the American way of life.⁶⁹ The Industrial Revolution changed this; suddenly, immigrants were considered an affront to American ideals because of their willingness to work for lower wages. An influx of foreign laborers could undercut American workers. These foreign

⁶⁷ 112 U.S. 580, 591 (1884).

⁶⁸ Motomura, Hiroshi, “Whose Immigration Law?: Citizens, Aliens, and the Constitution,” *Columbia Law Review* 97, no. 5 (Jun. 1997), 1591, <http://www.jstor.org/stable/1123443> (accessed March 2, 2012).

⁶⁹ Lindsay, “Immigration as Invasion,” 11.

laborers were seen as unfit members of society or, as Lindsay phrased it, people began to believe that “republicans were born, rather than made.”⁷⁰

Policymakers invoked imagery of invasion to explain this threat to American values. Michigan Representative Byron Cutcheon described foreign-born laborers as “the Goths and Vandals of the modern era... [who] come only to lay waste, to degrade, and to destroy.”⁷¹ Discussions of immigration in the late nineteenth century were dominated by concerns about the impact of foreign laborers on republican government.

Justice Field’s opinion in *Chae Chan Ping* invoked this stereotype as well. It includes an ambitious history of treaty agreements with China, and describes the growing sense of concern about the presence of Chinese laborers on Californian shores. According to Field, “people of the coast saw, or believe they saw... great danger that at no distant day that portion of our country would be overrun by [Chinese immigrants] unless prompt action was taken to restrict their immigration.”⁷² To Field, the risk of being overrun by Chinese labor was so great that Congress needed unprecedented power to curb immigration; the preservation of American society depended on the establishment of the plenary power.

Chae Chan Ping also appealed to concerns about Chinese immigrants in particular, confirming Congress’ ability to exclude immigrants if it “considers the presence of foreigners of a different race in this country, who will not assimilate with us,

⁷⁰ Lindsay, “Immigration as Invasion,” 7.

⁷¹ Ibid, 38.

⁷² 130 U.S. 581, 595 (1889).

to be dangerous to its peace and security.”⁷³ Eugenics was a powerful motivator for representatives legislating immigration limits in the 1880s. Massachusetts Representative Henry Cabot Lodge was troubled by the fact that

“[t]he immigration of people of those races which contributed to the settlement and development of the United States is declining in comparison with that of races far removed in thought and speech and blood from the men who have made this country what it is.”⁷⁴

This opinion was echoed throughout much of the political discourse of the era. Even Justice Brewer, who dissented in *Fong Yue Ting*, admitted the inferiority of Chinese immigrants. He stated, “[i]t is true that this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?”⁷⁵ His major concern with expanding the plenary power was its potential for application to other, non-inferior groups; he was unconcerned with discrimination against the Chinese.

Chin points out the aggressive racial bias in the Justice Department’s brief in *Fong Yue Ting*, which informed the Court that “the Chinese are ‘a people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits often of the most pernicious character.’”⁷⁶ The particularly odious nature of the Chinese was likely a major influence on the Court’s opinion. Chin points out that the

⁷³ 130 U.S. 581, 607 (1889).

⁷⁴ 22 Cong. Rec. 2,956 (1891) quoted in Lindsay, “Immigration as Invasion,” 38.

⁷⁵ 149 U.S. 698, 743 (1893) (dissenting opinion).

⁷⁶ Gabriel J. Chin, “Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration,” *UCLA Law Review* 46, no. 1 (1998), 18-19.

Fuller Court, which was responsible for the first plenary power decisions, was also responsible for *Plessy v. Ferguson* – a case which was later discredited because of its outdated views on race.⁷⁷ Chin proposes that the plenary power cases were decided on outdated values and should be re-examined by modern courts.

The solicitor general bolstered his claim by arguing for the legitimacy of racial discrimination on the national level. As evidence, he pointed to other nation's domestic policy of expelling immigrants based on race – including “the forcible removal by the United States of Indians,” the pogroms in Russia, and the “limitation upon [Jews'] rights and... status... in the German Empire.”⁷⁸ It is telling that the Court was persuaded in part that the federal government should look to German policies against the Jews as a good act to follow. Given the racial bias in establishing the plenary power, Chin is rightly skeptical of the modern Court's reliance on the doctrine. He argues for the need for a complete overhaul of immigration precedent because *Chae Chan Ping* and *Fong Yue Ting* are so important that “even decisions that do not cite them must rely on cases that do.”⁷⁹

Reconsidering the Plenary Power

In the 1880s, the Supreme Court asserted that authority over immigrants' entry into and removal from the United States belonged solely to Congress. This exclusive power was explained as an inherent feature of national sovereignty, which could not be

⁷⁷ Ibid.

⁷⁸ Ibid, 18.

⁷⁹ Ibid, 15.

denied or scrutinized by the Court itself. *Chae Chan Ping* and *Fong Yue Ting* both gave the legislature unprecedented power over immigrants.

Though Field and Gray treated their decisions as foregone conclusions in *Chae Chan Ping* and *Fong Yue Ting* respectively, federal authority was anything but accepted in the first one hundred years of America's history. State poor laws and quarantine regulations largely controlled the borders until the first federal statute was passed in 1875. Even then, state immigration statutes were invalidated because of their incompatibility with the commerce clause – an explicit grant of authority to Congress.

The plenary power is a relatively new phenomenon, and the history of immigration law reveals that such expansive federal authority over immigration was not evident at the founding or in the Constitution. When the Department of Justice asserts that the federal government has the right to “to enact[] and refine[] a detailed statutory framework governing immigration,” they are relying more on this line of judicial precedents rather than the cited provisions of the Constitution.⁸⁰ Since the plenary power came about in a context particularly focused on national security and national identity, it may be irrelevant to the realities of modern immigration.

⁸⁰ Plaintiff's Motion, 702 F. Supp. 980 (D. Ariz. 2010), 3.

Chapter 2: The Domestication of Immigration Law

Leaving aside racial motivations, the fact that the plenary power was originally conceived of in a very specific context raises questions about its continued validity. The major justification for exclusive federal authority was in the plenary power cases national security. In the 1890s, states and the federal government were protecting themselves from a perceived “invasion” of immigrants who posed a threat to the safety of the nation. But the scope of immigration-related laws expanded dramatically during the 20th century. In the 1970s, the Court discussed “alienage laws” which fall within traditional domains of state power but incidentally impact immigrants.¹ Alienage law is considered distinct from the traditional province of pure immigration law, often defined as “entrance and abode.”² The cases which developed the plenary power fell within the definition of pure immigration law. *Chae Chan Ping* addressed the question of an immigrant’s right of return to the country (entrance), and *Fong Yue Ting* involved the deportation of immigrants who failed to comply with conditions for remaining in the country (abode).

The distinction was generated because, unlike those statutes, some of the most important recent laws impacting immigrants have technically fallen within the domestic sphere. Looking at immigration-related laws in the employment and welfare arenas reveals that priorities have shifted inward. The United States Code now contains

¹ *De Canas v. Bica*, 424 U.S. 351 (1976).

² Michael J. Wishnie, “Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism,” *New York University Law Review* 76 (2001), 502, http://digitalcommons.law.yale.edu/fss_papers/933.

substantial immigration-oriented employment and welfare law which enjoy supremacy and judicial deference because of the plenary power doctrine. Many of these statutes cannot be directly connected to concerns over national security.

When it was originally conceived of as a method of self-preservation, the plenary power applied to control over national borders. Today, immigration regulation operates largely within the domestic sphere, influencing the day-to-day lives of aliens. This transition is most evident in immigration's overlap with employment and welfare laws over the past half-century. The trend exhibited in these two areas of law is alarming because it marries the judicial deference of immigration law with the expansive influence of alienage laws.

Employment Law: Alienage or Immigration Legislation?

The division between pure immigration law and so-called alienage law was clarified by the Supreme Court in *De Canas v. Bica*. In *De Canas*, the Court applied the distinction to a California statute which penalized the employers who knowingly hired illegal aliens ““if such employment would have an adverse effect on lawful resident workers.”³ The idea that states might have some authority under their police powers to enact laws which indirectly impact immigrants was addressed a century prior in *Chy Lung*, when Justice Miller stated that the Court was not obligated at that time “to decide for or against the right of a state... to protect herself by necessary and proper laws against paupers and convicted criminals from abroad.”⁴ This statement, though not legally

³ 424 U.S. 351, 352 (1976).

⁴ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

binding, indicates that even during the era which created the plenary power still believed states might have a right to regulation immigration in contexts where such laws are essential to the protection of the state itself.

Justice Brennan, who wrote for the majority in *De Canas*, acknowledged the scope of the plenary power, but asserted that “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration, and thus *per se* pre-empted.”⁵ The Court thus created a distinction between state laws which have “some purely speculative and indirect impact on immigration” and those which are “constitutionally proscribed regulation[s] of immigration.”⁶

The decision, which found the California statute constitutional as an exercise of state police powers, indicates that the Court believed that states could legislate within the category of alienage law. The Court attempted to differentiate between areas where the federal government had exclusive authority and those where the states had some legislative power, but the distinction is often not as simple as it appears in *De Canas*. Sometimes it is nearly impossible to distinguish between the two forms of law.

Some scholars, including Hiroshi Motomura, have argued that the alienage law is not a useful classification because of frequent “functional overlap” with immigration law.⁷ Arizona’s SB 1070 does not directly regulate entrance, but its intention is to create “attrition through enforcement” and deter illegal immigrants from wanting to enter the

⁵ 424 U.S. 351, 355 (1976).

⁶ 424 U.S. 351, 356 (1976).

⁷ Motomura, Hiroshi, “COMMENT: Immigration and Alienage, Federalism and Proposition 187,” *Virginia Journal of International Law* 35, (Fall 1994), 202, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/vajint35&div=16&id=&page=> (accessed March 29, 2012).

state.⁸ Similarly, federal laws around deportation deal directly with abode, and yet, Motomura argues, its practical impact is “to regulate the everyday lives of aliens in the United States.”⁹ Each of these laws technically belongs in one category, but acts as a proxy for the other. As a consequence, proponents of SB 1070 call the legislation alienage law, while the Justice Department believes it is immigration law (and thus in violation of the plenary power).¹⁰ Given the overlap between alienage and pure immigration law, both the Department of Justice and Arizona are correct in their characterization.

Moreover, though alienage law was originally presented as an appropriate area for state legislation, it also hosts substantial federal legislation. Two years before *De Canas*, the federal government had already begun its inward shift towards regulating immigrants’ day-to-day lives with an amendment to the Farm Labor Contractor Registration Act (FLCRA), an act which set regulations for contractors who recruited migrant workers.¹¹ The amendment banned the employment of undocumented migrant workers, but its scope was insufficient to persuade the Court that Congress intended to preclude states from regulating in the field. Brennan argued that the federal government would need to enact a law that was a “complete ouster” of control to preempt the California statute.¹²

In 1986, Congress enacted just such a law with the Immigration Reform and Control Act (IRCA), which imposed several restrictions on the employment of illegal

⁸ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 1.

⁹ Motomura, “Immigration & Alienage,” 203.

¹⁰ Plaintiff’s Motion for Preliminary Injunction, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 14.

¹¹ U.S. Congressional Research Service, *A Glossary of Terms, Programs, and Laws, 2005 Edition* (Washington, 2005).

¹² 424 U.S. 351, 357 (1976).

aliens.¹³ These restrictions were based on the recommendations of the Select Commission on Immigration and Refugee Policy which found that “almost all illegals are attracted by U.S. jobs that pay relatively high wages.”¹⁴ Consequently, commission members voted 14-2 to enforce prohibitions on hiring illegal immigrants by fining employers.¹⁵ The IRCA implemented this suggestion, and also established a mandatory employee verification system.¹⁶

With the IRCA, the United States moved further away from pure immigration law. Firstly, the law authorizes criminal penalties for employers who are in violation of its provision.¹⁷ Moreover, these fines are applied to businesses which were likely not involved in their illegal employee’s entry into the country. The IRCA goes far beyond entrance and abode; it penalizes United States citizens for their hiring decisions – an area of legislation traditionally left to the states.¹⁸

The upswing in federal “alienage law” is dangerous, especially when these laws receive the judicial deference associated with the plenary power. When the IRCA was enacted, federal agencies admitted that it would result in “a widespread pattern of discrimination against *authorized* workers.”¹⁹ In the 1940s, the Court decided that a state

¹³ *Immigration Reform and Control Act of 1986*, Public Law 99-603, § 101, *U.S. Statutes at Large* 100 (1986): 3359, codified at U.S. Code 8, §1324a.

¹⁴ Philip L. Martin, “Select Commission Suggests Changes in Immigration Policy,” *Monthly Labor Review* (1982), 36, <http://www.bls.gov/opub/mlr/1982/02/art4full.pdf> (accessed March 29, 2012).

¹⁵ *Ibid.*

¹⁶ U.S. Department of Agriculture, *Federal Laws and Regulations Affecting Agricultural Employers Immigration Reform and Control Act of 1986* (Washington, DC, 2000).

¹⁷ Juliet P. Stumpf “States of Confusion: the Rise of State and Local Power over Immigration,” *North Carolina Law Review* 86 (2008), 1581-1584, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157552.

¹⁸ *Ibid.*, 17.

¹⁹ Karla M. McKanders, “Welcome to Hazleton! ‘Illegal’ Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It,” *Loyola University Chicago Law Journal* 39, no. 1 (2007), 136, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407727.

law which could result in the harassment of lawful residents was unconstitutional,²⁰ but discriminatory consequences of IRCA's employment sanctions were unquestioned because it was passed by Congress.

When Justice Brewer dissented in *Fong Yue Ting*, the case which extended plenary authority to deportation, he questioned the apparently limitless nature of the plenary power.²¹ Brewer understood the potential for the plenary power to expand. The IRCA sanctions employers rather than undocumented workers, but that is a policy decision, not a legal one. It appears that Brewer's concerns about the limits of federal authority over immigration were well-founded.

Welfare Law: Constitutional and Devolved Discrimination

Discrimination against aliens is particularly evident in the last half-century of welfare law. Whereas employment law has largely focused on restricting economic opportunities for illegal aliens, the discussion on welfare benefits has centered on legal residents. In the 1970s, states attempting to balance their budgets and lower the burden of indigent aliens imposed strong restrictions on state general assistance programs. In *Graham v. Richardson*, the Supreme Court took up state laws in both Arizona and Pennsylvania which restricted access to state welfare programs.²²

A 1932 Pennsylvania law at issue in *Graham* funded assistance for some residents who did not qualify for federally-funded aid – provided that the needy were United States citizens. The Arizona law, enacted in 1962, forbade general assistance to any resident

²⁰ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

²¹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

²² *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

alien who had not lived in the country for over fifteen years. Three legal residents of the United States sued, claiming that the distinction violated their Equal Protection rights under the Fourteenth Amendment. Both states justified these restrictions as a necessity to preserve the “fiscal integrity” of their general assistance programs.²³

Lower courts did not find this justification compelling, and their sentiments were affirmed by the Supreme Court.²⁴ Writing for the majority, Justice Blackmun argued that strict scrutiny was necessary because “[a]liens as a class are a prime example of a ‘discrete and insular’ minority,” meaning that “classifications based on alienage... are inherently suspect.”²⁵ With this heightened level of scrutiny, the Court determined that Arizona and Pennsylvania’s economic concerns were an insufficient justification for discriminating against aliens. Moreover, Blackmun concurred with the Pennsylvania court that this distinction was “particularly inappropriate and unreasonable” when applied to legal aliens because they pay taxes and participate in the state economy.²⁶

In *Graham*, the Court declined to take up the issue of whether the federal government could enact a similar law. Five years later, however, the question was introduced in *Mathews v. Diaz* which investigated the constitutionality of a provision in U.S. Code that denied Medicare benefits to aliens who had not been admitted as permanent residents or had not resided in the country for at least five years.²⁷ The District

²³ 403 U.S. 365, 374 (1971).

²⁴ 403 U.S. 365 (1971).

²⁵ 403 U.S. 365, 372 (1971).

²⁶ 403 U.S. 365, 374 (1971).

²⁷ *Mathews v. Diaz*, 426 U.S. 67 (1976).

Court held that the residence requirement violated resident aliens' Due Process rights under the Fifth Amendment, and that the entire provision was thus unconstitutional.²⁸

The Court unanimously reversed the District Court's decision, claiming that the provision did not violate the Fifth Amendment. Justice Stevens emphasized that while all persons (including aliens) have due process rights, it does not follow that "all aliens are entitled to enjoy all the advantages of citizenship."²⁹ The Court's opinion relied heavily on the plenary power. Stevens indicated that the federal government had wide latitude to distinguish between groups of immigrants, particularly "based on the character of the relationship between the alien and this country" as part of foreign relations.³⁰ In fact, Stevens cited *Graham* as evidence in support of this decision because it emphasized the unique role of the federal government in regulating immigration.

In *Graham*, the state statutes triggered strict scrutiny because they involved aliens, who were determined to be a protected group. The same class of residents – at least those who were also over 65 – was affected by the Medicare requirements. Yet the Court declined to acknowledge the discrete and insular nature of aliens impacted by the federal law at issue in *Mathews*. Even though the law at issue did not directly address the "entrance and abode" of immigrants, the Court afforded plenary power to the federal government and required only a rational basis for the law to stand. The Court felt it had

²⁸ 426 U.S. 67 (1976).

²⁹ 426 U.S. 67, 78 (1976).

³⁰ 426 U.S. 67, 80 (1976).

no authority to “substitute [its] judgment for that of Congress.”³¹ This distinction between state and federal legislation has largely held true since *Mathews* was decided.³²

When the Arizona and Pennsylvania statutes were at issue, the Court referred to the situation as “welfare cases.”³³ That classification was accurate. These statutes should be classified as alienage laws because they do not directly involve entry into or exit from the United States. Logically, a nearly identical requirement on the federal level should also be categorized as alienage law, and therefore not subject to the plenary power. But in this case, the Court declined to apply strict scrutiny against the federal government because of the law’s tangential connection to immigration and naturalization. In doing so, the Court degraded the distinction between alienage and immigration law, allowing the federal government even wider latitude than it had previously enjoyed. Stumpf claims that “domesticating immigration law muddies the equal protection dichotomy.”³⁴ *Mathews* set the stage for the 1990s, when states once again became involved in restricting social services to resident aliens – eventually with the blessing of the federal government.

The question of immigrant access to state social services became relevant again in the early 1990s with a wave of anti-immigrant legislation starting with California’s Proposition 187. Named the “Save our State” (SOS) initiative, Proposition 187 focused on undocumented aliens and restricted their access to social services, public education,

³¹ 426 U.S. 67, 84 (1976).

³² Wishnie, “Laboratories of Bigotry,” 507.

³³ 403 U.S. 365, 366 (1971).

³⁴ Stumpf, “States of Confusion,” 1606.

and health care.³⁵ When Proposition 187 passed in 1994, California was “in the midst of its worst economic downturn since the Depression,” and anti-immigrant sentiment was high.³⁶ Fifty-nine percent of Californian voters supported the initiative.³⁷

While the legislation was, on its face, an alienage restriction, its intention was to discourage legal and illegal immigration into the state. California Governor Pete Wilson stated that the measure would cause some illegal immigrants to “self-deport.”³⁸ The statute also required law enforcement officials to determine the legal status of arrestees, and to report illegal aliens to INS and the California Attorney General.³⁹ School employees, hospital workers, and social workers were also tasked with reporting illegal immigrants to federal and state authorities.⁴⁰

Proposition 187 was criticized for being “poorly worded, poorly drafted, inadequate, and ambiguous.”⁴¹ It also directly contradicted *Plyler v. Doe*, a Supreme Court case which secured the right for children of illegal immigrants to attend public elementary school.⁴² Justice Brennan’s majority opinion applied intermediate scrutiny (which required “a substantial interest of the State”) to an analogous law in Texas prohibiting undocumented children from receiving free public education.⁴³ The Court,

³⁵ Bryan J. Balin, “State Immigration Legislation and Immigrant Flows: An Analysis” (PhD diss. The Johns Hopkins University School of Advanced International Studies, 2008).

³⁶ Jeffrey R. Margolis, “Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187,” *The University of Miami Inter-American Law Review* 26, no. 2 (1994/1995), 366, <http://www.jstor.org/stable/40176355> (accessed March 11, 2012).

³⁷ *Ibid*, 366.

³⁸ William Safire, “Self-deportation?” *New York Times*, November 21, 1994, <http://www.nytimes.com/1994/11/21/opinion/essay-self-deportation.html> (accessed March 10, 2012).

³⁹ Proposition 187: Save Our State Initiative (1994).

⁴⁰ Margolis, “Closing the Doors.”

⁴¹ *Ibid*, 379.

⁴² *Plyler v. Doe*, 457 U.S. 202 (1982).

⁴³ 457 U.S. 202 (1982).

who cited *Graham*, determined that “a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources.”⁴⁴ In *Plyler*, Texas failed to prove that prohibiting the education of this class would ameliorate the financial burden imposed by illegal immigration.

The social services portion of Proposition 187 was also suspect given the Court’s decision in *Graham*.⁴⁵ Therefore, it was unsurprising that the initiative was struck down by a federal District Court judge in 1997. Judge Mariana R. Pfaelzer declared the law facially unconstitutional. Notably, Pfaelzer’s opinion relied substantially on a piece of federal legislation passed two years after the ballot measure, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA or Welfare Act), which included several provisions about immigrants.⁴⁶ To Pfaelzer, the existence of the Welfare Act, which had much in common with the ballot referendum, confirmed that Proposition 187 was truly an immigration regulation “scheme.”⁴⁷

Governor Pete Wilson was displeased with this decision, going so far as to call the judge’s opinion “as flawed and error-prone as the 1962 New York Mets.”⁴⁸ Unfortunately for the initiative’s supporters, that same year Governor Gray Davis, who disagreed with Proposition 187, replaced Wilson. In April 1999, Davis asked the court for

⁴⁴ 457 U.S. 202, 227 (1982).

⁴⁵ Margolis, “Closing the Doors.”

⁴⁶ Wishnie, “Laboratories of Bigotry,” 494.

⁴⁷ Patrick McDonnell, “Prop. 187 Found Unconstitutional by Federal Judge,” *Los Angeles Times*, November 15, 1997. <http://articles.latimes.com/print/1997/nov/15/news/mn-54053> (accessed March 11, 2012).

⁴⁸ *Ibid.*

mediation rather than a traditional appeal.⁴⁹ Three months later, he dropped the appeal, “effectively killing” the initiative.⁵⁰ Consequently, Pfaelzer’s opinion was final.

PRWORA and Proposition 187 are substantially different pieces of legislation. On the one hand, Proposition 187 is stronger because it required service providers to report on immigrants’ legal status, and it fully restricted access to health and welfare services. The federal law makes allowances for certain services like immunizations. On the other hand, PRWORA is substantially more restrictive because it applies to several classes of legal noncitizens as well as illegal aliens. PRWORA permits states to deny some state and federal welfare benefits to legal immigrants, though it does not require them to do so. This law sidesteps the equal protection concerns raised in *Graham*, and functionally serves to devolve the federal government’s discretion to the states.⁵¹

This devolution comprises a large amount of the Welfare Act. Michael Wishnie, a professor of immigration and labor law, claims “legal immigrants were plainly a chief congressional target,” and that sections of the law targeting aliens were responsible for an estimated forty-four percent of the bill’s intended savings.⁵² The text of the bill admitted this aim, stating that the law hoped to “assur[e] that aliens be self-reliant in accordance with national immigration policy.”⁵³

⁴⁹ Dave Leshner and Dan Morain, “Davis Asks Court to Mediate On Prop. 187,” *Los Angeles Times*, April 16, 1999. <http://articles.latimes.com/print/1999/apr/16/news/mn-28023> (accessed March 11, 2012).

⁵⁰ Patrick McDonnell, “Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles,” *Los Angeles Times*, July 29, 1999. <http://articles.latimes.com/1999/jul/29/news/mn-60700> (accessed March 11, 2012).

⁵¹ Wishnie, “Laboratories of Bigotry,” 507.

⁵² *Ibid*, 511.

⁵³ *Ibid*, 512.

PRWORA represents yet another example of the dangers of the federal plenary power. Due to the Supreme Court's reluctance to involve itself in immigration matters, the immigrant-related provisions of the Welfare Act were never found unconstitutional, indicating that the plenary power may be unofficially devolved to the states. Since 1996, the "rational basis" test from *Mathews* has been applied to state welfare classifications.⁵⁴

In both *Graham* and *Mathews*, the Court expressed a desire for unified welfare classifications because of the potential foreign policy implications of denying certain aliens benefits. But the PRWORA did not create a unified policy; it actually created the possibility of fifty distinct and inconsistent policies.⁵⁵ Under the Welfare Act, the United States fails to speak with one voice because it permits every state to set its own welfare standards.⁵⁶

Instead of creating a single policy, PRWORA granted states the discretion to pass laws which were previously found to violate the Constitution. In fact, when *Graham* was originally decided, Blackmun rejected Arizona's claim that its law was justified by an ambiguous section of federal law. Blackmun stated: "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause."⁵⁷ And yet, twenty-five years later Congress successfully did so.

Consequences of Domesticating Immigration Law

⁵⁴ Ibid, 518.

⁵⁵ Ibid, 528.

⁵⁶ Peter J. Spiro, "The States and Immigration in an Era of Demi-Sovereignities," *Virginia Journal of International Law* 35 (1994-1995), 144, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/vajint35&div=14&id=&page=> (accessed July 20, 2011).

⁵⁷ 403 U.S. 365, 382 (1971).

Before PRWORA, precedent gave the federal government substantially more leeway than the states in discriminating against legal aliens. The predominant belief, articulated by Motomura in 1994, was that “precisely because the power is relatively... unfettered, it may be wise to restrict those who can exercise it.”⁵⁸ But the Welfare Act changed that. With PRWORA, states can now discriminate against a group which has already been determined to be a discrete and insular minority, and that group’s members have no recourse in the Fourteenth Amendment. Behavior that was declared unconstitutional in 1971 suddenly became permissible with an act of Congress.

Wishnie considers this a disturbing development in immigration law. He fears that the devolution of the plenary power in the welfare context will “erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at subfederal levels.”⁵⁹ But the actual risk of conflating alienage law with immigration exists across all levels of government. The IRCA regulates the workplace decisions of American citizens in the name of immigration law. *Mathews* treats a portion of the welfare system as an immigration issue, further invalidating the distinction.

If the federal government has moved beyond controlling entrance and abode, then the national security justification is little more than a relic. Major components of modern immigration law are unconcerned with a potential foreign invasion; instead, they are motivated primarily by a desire to protect American citizen’s work opportunities and

⁵⁸ Motomura, “Immigration and Alienage,” 216.

⁵⁹ Wishnie, “Laboratories of Bigotry,” 553.

welfare benefits. These goals are not inherently problematic, but they are also undeserving of the judicial deference associated with the plenary power.

Domesticated immigration law has also invited a host of new discriminatory laws such as Proposition 187 and SB 1070 as states attempt to exert control within the domain of their historic police powers. In 1994, Spiro declared that “immigration is now largely a state-level concern.”⁶⁰ While his claim has not necessarily been accepted by federal lawmakers, it has certainly been embraced by state and local officials. According to Stumpf, this creates the risk that when state and local laws come to resemble federal statutes, “judges may come to consider strict scrutiny of such state regulation as too restrictive of state interests.”⁶¹ Many of these conversations concern the risks of allowing subfederal regulation because it may lead to a “race to the bottom” between the states.⁶²

But this understates the potential consequences of this trajectory and places too much faith in the federal government. As the government “relocate[s] the locus... from the border to the interior,” it becomes increasingly likely to impinge on the constitutional rights of aliens.⁶³ Federal, state, and local governments should all be subject to increased scrutiny when legislating about the lives of daily lives of aliens already within American borders.

Instead of relying on an outdated and questionable precedent, a new immigration scheme should be developed. Ideally, such a system could keep every level of government in check, and open a path to a comprehensive regulatory scheme which

⁶⁰ Spiro, “Demi-Sovereignities,” 121.

⁶¹ Stumpf, “States of Confusion,” 1606.

⁶² Wishnie, “Laboratories of Bigotry,” 554.

⁶³ Stumpf, “States of Confusion,” 1586.

protects both the interests of the government and the people. Trying to protect aliens by restricting legislation to the federal level is insufficient if and when the national government chooses to discriminate against aliens.

Chapter 3: The Revolution of the Plenary Power, Part 1 — Theoretical Framework

Given the current inward direction of immigration law, it is unsurprising that state governments continually attempt to regulate aliens within their borders. Waves of sub-federal legislation have provoked strong responses among legal scholars, who, for the most part, eagerly support or aggressively condemn state laws on immigration. Since the two camps operate using two different value systems, compromise is rare.

This disagreement is evident in the current legal battle between the United States and Arizona over SB 1070. The Arizona statute requires, among other things, that state officials verify an individual's legal status during any stop or arrest if the officer has "a reasonable suspicion" that the person may be unlawfully present in the United States.¹ Section 5(c) of the law makes it a crime for an undocumented worker to "knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in [Arizona]."²

Federal and state officials disagree about the breadth of Arizona's authority over immigration. The federal government concedes that a state may "cooperat[e] with the federal government on immigration matters... [and] adopt[] state laws that have incidental effects on aliens."³ But the Department of Justice considers Arizona's entire

¹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 1.

² Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 5(c).

³ Plaintiff's Motion for Preliminary Injunction, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 14.

statute an impermissible regulation of immigration because Section 1 states its intention to create a state “public policy” of attrition through enforcement.⁴ Moreover, the DOJ brief asserts that Sections 3, 4, and 5 of the statute “provide several means of criminally sanctioning any alien who is unlawfully present in the state – a status which is not a federal crime.”⁵ The federal government is primarily concerned with maintaining its authority over the bulk of immigration regulation; it is willing to allow state regulations only when they do not impede on its national objectives.

Arizona legislators, on the other hand, see no issue in Section 1 of the bill, which states “[t]he provisions of this act are intended to work together to discourage and deter unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”⁶ When defending itself against the Department of Justice’s allegations, Arizona argued that the policy of attrition through enforcement established by SB 1070 “incorporate[s]” federal immigration policy, including “the ‘vigorous enforcement’ policy” reaffirmed most recently by Executive Order 13465 on June 6, 2008.⁷ Signing the bill into law, Arizona Governor Jan Brewer said that SB 1070 “strengthens the laws of [the] state.”⁸ Lawyers for the state of Arizona point to a

⁴ Plaintiff’s Motion, 702 F. Supp. 980 (D. Ariz. 2010), 14.

⁵ Ibid, 15.

⁶ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 1.

⁷ Defendant’s Response, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 28.

⁸ Jan Brewer, “Statement by Governor Jan Brewer,” Office of the Governor of Arizona, http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf (accessed April 15, 2012).

particular provision of the law - A.R.S. § 11-1051(L) - which states the bill must “be implemented in a matter consistent with federal laws regulating immigration.”⁹

Judge Susan R. Bolton who serves on the United States District Court for the District of Arizona agreed with the state that Section 1 was not unconstitutional. Bolton stated that since Section 1 “has no operative function,” it does not constitute the creation of “a single and unified statutory scheme” which could be enjoined in its entirety.¹⁰ Bolton did use the section as “context and backdrop” for considering other provisions, and enjoined several portions of the law.¹¹ The Supreme Court, which plans to tackle Arizona’s appeal beginning with oral argument on April 25, 2012, will likely reach a similar decision about the constitutionality of Section 1.

The federal government’s attempt to enjoin the statute in its entirety based on Section 1 did not succeed, but their argument presents an interesting and useful view into the debate over where immigration power should lie. Many scholars, like Karla McKanders, a law professor at University of Tennessee-Knoxville, support the plenary power as a means of protecting immigrants’ rights.¹² Gabriel Chin, an immigration law scholar, and Marc Miller, a law professor at University of Arizona, argue that laws like

⁹ Defendant’s Response, 702 F. Supp. 980 (D. Ariz. 2010), 29.

¹⁰ *United States v. Arizona*, 703 F.Supp.2d 980, 13 (D. Ariz., 2010).

¹¹ 703 F.Supp.2d 980, 13 (D. Ariz., 2010).

¹² Karla M. McKanders, “Welcome to Hazleton! ‘Illegal’ Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It,” *Loyola University Chicago Law Journal* 39, no. 1 (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407727.

SB 1070 are necessarily unconstitutional because they infringe on fundamentally exclusive and non-delegable federal powers.¹³

Governor Brewer, on the other hand, argues that Arizona is compelled to regulate immigration “as [it] work[s] to solve a crisis [it] did not create and the federal government has refused to fix.”¹⁴ Supporters of this viewpoint agree that states should inject themselves into regulating aliens, and offer substantive support for their opinions. Peter Spiro, an international law scholar, believes that because the burden of immigration falls disproportionately on a handful of states – California, Arizona, Texas, and other border states – a national policy on immigration cannot be as successful.¹⁵ Others have expressed a belief that state-level regulation might prove kinder to immigrants than federal policies.¹⁶

Clare Huntington, a law professor at Fordham University, acknowledges this conflict and argues that immigration authority should be shared across multiple levels of government. She believes that accepting shared responsibility “opens the door to weighing the interests and values traditionally implicated in debates over the respective

¹³ Gabriel Chin and Marc Miller, “The Unconstitutionality of State Regulation of Immigration through Criminal Law,” *Duke Law Journal* 61, no. 2 (November 2011): 251-314, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685# (accessed December 10, 2011).

¹⁴ Jan Brewer, “Statement by Governor Jan Brewer.”

¹⁵ Peter J. Spiro, “The States and Immigration in an Era of Demi-Sovereignities,” *Virginia Journal of International Law* 35 (1994-1995), 144, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/vajint35&div=14&id=&page=> (accessed July 20, 2011).

¹⁶ Christina Rodriguez, “The Significance of the Local in Immigration Regulation,” *Michigan Law Review* 106 (February 2008), <http://www.michiganlawreview.org/assets/pdfs/106/4/rodriguez.pdf> (accessed March 10, 2012).

roles of the national and subnational governments” in other legal contexts.¹⁷ In order to understand arguments for and against sub-federal immigration law, one must explore and evaluate the values underlying each side’s arguments.

Supporters of immigration federalism (or some version of power-sharing between states and the federal government) rely principally on two arguments. First, they argue that states are better equipped to handle immigration than the oversized federal government. The alleged advantage is two-fold – states and municipalities can experiment with legislation more efficiently, and they can be more responsive to successes and failures (in their own territory and others). Supporters of subnational regulation also argue that decades of federal inaction have resulted in dangerous and expensive immigration problems which disproportionately burden certain states. They believe that states are better equipped to understand and manage their immigrant populations than an unsupportive and largely absent federal government.

These ideas conflict with two arguments often used in favor of federal regulation. Supporters of exclusive authority argue that the federal government “better protects the fundamental rights of individuals and groups.”¹⁸ Proponents of federal exclusivity in immigration point to the federal government’s history of leading the charge in protecting minority rights, as seen in civil rights legislation. They also focus on the idea that immigration regulation must be uniform. After SB 1070 passed, President Obama stated a

¹⁷ Clare Huntington, “The Constitutional Dimension of Immigration Federalism,” *Vanderbilt Law Review* 65, no. 3 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968716 (accessed November 14, 2011).

¹⁸ Huntington, “Constitutional Dimension,” 829.

concern about the potential for a “patchwork” of immigration laws in the United States.¹⁹ The President’s statement harkens back to *Chy Lung* when the Supreme Court worried that “a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations.”²⁰ Arguments about uniformity are particularly potent when connected to foreign relations and national security.

All four of these arguments have legitimacy, and neither viewpoint can be dismissed out of hand. Instead, arguments for and against each point must be evaluated and compared in order to determine the best balance between innovation, action, security, and fairness. As Huntington points out, allowing some subnational legislation “does [not] mean that state and local governments may play an unfettered role in immigration regulation.”²¹ It simply means that the appropriate roles must be determined.

Laboratories of Democracy or Bigotry?

One of the strongest arguments for decentralized lawmaking is that it increases innovation, and allows states to serve as the “laboratories of democracy” first lauded by Justice Brandeis in the 1930s. The theory is that individual states are able to conduct small-scale experiments in public policy, allowing them to serve “as a source of mutual inspiration leading piecemeal to social progress.”²² In the context of immigration,

¹⁹ Obama: ‘Patchwork’ Immigration Law Won’t Work, *CBS News*, August 2, 2010. http://www.cbsnews.com/2100-500202_162-6735984.html (accessed April 10, 2012).

²⁰ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

²¹ Huntington, “Constitutional Dimension,” 827

²² Weiss, “Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union,” *Columbia Journal of Law and Social Problems* 41 (Fall 2007): 113, <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=41+Colum.+J.L.+%26+Soc.+Probs.+81&srctype=smi&srcid=3B15&key=770422a756bb5ad54a8b8ae7d36842e1> (accessed April 2, 2012).

federalism would allow states to create policies customized to their particular labor and population needs. States and localities could set their own priorities, and could experiment with various policies much more deftly than the federal government. Moreover, if a policy was successful in Arizona, it could be adopted in other states, whereas unsuccessful policies would result in “quick lessons”²³ for the localities that passed them and the country as a whole.

This idea is controversial, however, and scholars like Michael Wishnie express concern that states will instead become “laboratories of bigotry.”²⁴ This concern is particularly grave with immigration, because the actions of one state necessarily impact its neighbors. In 2010, illegal aliens left Arizona for states with laxer laws like New Mexico.²⁵ A similar exodus occurred in Alabama a year later when the state passed HB 56,²⁶ which the governor proudly called “the strongest immigration law in this country.”²⁷ In theory, states which receive these waves of immigrants may be forced to enact similar laws to manage their own problems – creating a “race to the bottom” where states create

²³ Huntington, “Constitutional Dimension,” 832.

²⁴ Michael J. Wishnie, “Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism,” *New York University Law Review* 76 (2001), 553, http://digitalcommons.law.yale.edu/fss_papers/933.

²⁵ Illegal Immigrants Leaving Arizona Over New Law, *CBS News*, April 29, 2010. http://www.cbsnews.com/2100-201_162-6442729.html (accessed April 4, 2012).

²⁶ Scott Finn, “Families Broken Up as Immigrants Flee Alabama,” NPR, entry posted October 24, 2011, <http://www.npr.org/2011/10/24/141502571/families-broken-up-as-immigrants-flee-alabama> (accessed April 4, 2012).

²⁷ Campbell Robertson, “After Ruling, Hispanics Flee an Alabama Town,” *New York Times*, October 3, 2011. http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html?_r=1&pagewanted=all (accessed April 4, 2012).

hostile environments until a handful of states which fail to discriminate against aliens are overwhelmed by the country's alien population.²⁸

States enacting tough immigration laws may discover that such legislation has unintended negative effects. In Alabama, HB 56, which was aimed at undocumented immigrants, caused a mass migration of legal aliens as well.²⁹ Some of these aliens feared harassment by the law, while others were members of families with mixed legal status and moved to protect their unauthorized relatives.³⁰ The statute was roundly criticized for "leaving rotting crops in fields and [creating] critical shortages of labor."³¹ One University of Alabama professor, Samuel Addy, estimates that Alabama's HB 56 will cost the state at least 70,000 jobs and reduce the state's economy by \$2.3 billion per year.³² If Addy's estimates are right, then Alabama may be forced to create incentives encouraging legal and illegal aliens to re-enter the state. In short, Alabama may learn one of the quick lessons Huntington believes will result from decentralized law-making.

Another possibility is that subnational immigration regulation could potentially result in "laboratories of generosity,"³³ where individual states pass less stringent laws than the federal government. Christina Rodriguez, a constitutional law professor at New York University, points out that in major metropolises with large foreign-born

²⁸ George Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton, NJ: Princeton University Press, 2011), 109.

²⁹ Robertson, "After Ruling."

³⁰ Finn, "Families Broken Up."

³¹ Robertson, "After Ruling."

³² Rich Robinson, "UA Professor Believes Immigration Law Will Hurt Economy," *Crimson White (University of Alabama)*, March 20, 2012. <http://cw.ua.edu/2012/03/20/ua-professor-believes-immigration-law-will-hurt-economy/> (accessed April 3, 2012).

³³ Howard F. Chang, "Public Benefits and Federal Authorization for Alienage Discrimination by the States," *NYU Annual Survey American Law* 53 (2003): 363-364, http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__annual_survey_of_american_law/documents/documents/ecm_pro_065054.pdf (accessed April 1, 2012).

populations, immigrants may have more “de facto power in the cities they constitute” than in national politics.³⁴ Rodriguez focuses primarily on “global cities” like New York and Los Angeles, but also acknowledges that less cosmopolitan areas like Cambridge, Massachusetts and New Haven, Connecticut, have also treated immigrants generously.³⁵ If states are truly laboratories of generosity, subfederal control may actually provide stronger rights to immigrants.

One example of this generosity occurred in the wake of PRWORA, the 1996 welfare statute which grants states the ability to discriminate on the basis of alienage when distributing benefits. Many states with major immigrant populations chose to maintain benefits for legal aliens, with some adding state-financed Medicaid benefits as well.³⁶ Huntington mentions that “[d]ecentralization and devolution might ensure, for better or worse, that the national government does not enact legislation reflecting extremes at either end of the political spectrum.”³⁷ At the time, the federal government was under immense pressure to restrict benefits to immigrants; PRWORA may have mitigated that pressure while allowing individual states to continue to provide benefits. While action in the 1990s benefitted immigrants, the trend could easily reverse due to anti-immigrant frenzy or tough economic climate, whereas this risk would not exist if states were still subject to strict scrutiny under *Graham*. State laws might be generous,

³⁴ Rodriguez, “Significance of the Local,” 577.

³⁵ Ibid.

³⁶ Peter Schuck, “Some Federal-State Developments in Immigration Law,” *NYU Annual Survey of American Law* (2001-2003): 389, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2666&context=fss_papers (accessed March 20, 2012).

³⁷ Huntington, “Constitutional Dimension,” 832.

but unofficial devolutions of power like PRWORA also leave immigrants on shaky grounds.

Localities have also shown generosity towards immigrants through enforcement policies. Since the 1980s, certain municipalities have created sanctuary policies which protect illegal immigrants by prohibiting local officials and police officers from reporting the legal status of residents to the federal government.³⁸ The idea behind these sanctuary cities is to maintain strong relationships between law enforcement and the local community, so that even illegal residents are able to contact the police if they are victims of a crime. These policies are an example of leniency at the sub-federal level.³⁹

Sanctuary policies are controversial, however, and some argue that they conflict with §642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁴⁰ States are also not in agreement about these policies. Section 2 of SB 1070 addresses these policies head on by mandating:

“No official or agency of this state or a country, city, town, or other political subdivision of this state may adopt a policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.”⁴¹

³⁸ Peter Fimrite, “Newsom Says S.F. Won't Help with Raids,” *San Francisco Chronicle*, April 23, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/23/BAGOHPDLLT1.DTL> (accessed April 2, 2012).

³⁹ Huntington, “Constitutional Dimensino,” 834.

⁴⁰ U.S. Congressional Research Service, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Vina, and Karma Ester, RL32270 (Washington, DC, 2006).

⁴¹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2(A).

Arizona is not the only state to attempt to undermine sanctuary policies within its borders. In June 2011, Governor Rick Perry in Texas proposed SB 9, which would ban sanctuary cities from the state. So far, Texas has failed to pass the legislation – a fact which garnered Perry criticism when he was on the Presidential campaign trail later that year.⁴²

It is impossible to predict whether in the future states will act as laboratories of bigotry or generosity. Certainly, legislation like SB 1070 and HB 56 seem to lean in the direction of the former. As Rodriguez points out, states often perform a balancing act in dealing with immigrants. Subfederal governments often start with “accommodationist” intentions which aim to integrate and assimilate aliens into the general population, but eventually switch to “restrictionist” measures to try to dissuade immigration as the number of aliens in the area continues to grow.⁴³ While many believe this risk is insufficient to justify closing states out of the immigration arena, it does provide evidence that state legislation should be closely monitored. Restrictionist state legislation can pose a problem for individual rights, especially if – as with PRWORA – states are not subject to a strong level of scrutiny by both the courts and the federal government.

While the legal battles about state legislation have largely been framed in terms of states’ rights, many Americans are more concerned about the statutes’ potential to violate civil rights of legal and illegal residents.⁴⁴ Some have even drawn parallels between these

⁴² Reid Epstein, “Rick Perry Sanctuary City Stance under Attack,” *Politico*, September 28, 2011. <http://www.politico.com/news/stories/0911/64622.html> (accessed April 4, 2012).

⁴³ Rodriguez, “Significance of the Local,” 579.

⁴⁴ Kevin Johnson, “Sweet Home Alabama? Immigration and Civil Rights in the “new” South,” *Stanford Law Review Online* (December 5, 2011): 22-

laws and those of the 1960s, like Kevin R. Johnson, Dean of the UC Davis School of Law, who states that “[t]he current state laws eerily bring back memories of the ‘states’ rights’ defense of segregation.”⁴⁵

In 2010, the ACLU of Arizona published a press release condemning the passage of SB 1070. In the document, Alessandra Meetze, the Executive Director of the organization, described the law as a gross violation of individual rights. “[Governor Brewer] has just given every police agency in Arizona a mandate to harass anyone who looks or sounds foreign,” Meetze criticized, “while doing nothing to address the real problems we’re facing.”⁴⁶ President Barack Obama agreed, stating that the law could “undermine basic notions of fairness that we cherish as Americans.”⁴⁷

Under SB 1070, police officers are required to verify the immigration status whenever they have a “reasonable suspicion” that someone they stopped is illegally in the country.⁴⁸ Critics argue that the law will lead to the harassment of legal residents on the basis of race. Governor Brewer, cognizant of these claims, mentioned them in her signing statement for SB 1070, claiming that she “will NOT tolerate racial discrimination or racial profiling in Arizona.”⁴⁹ Brewer’s claim is undermined, however, by her assertion that the law will be executed in a way that is “consistent with federal law.”⁵⁰ In some

28, <http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-22.pdf>(accessed April 1, 2012).

⁴⁵ Ibid.

⁴⁶ “Arizona Immigration Law Threatens Civil Rights and Public Safety, Says ACLU,” Immigrant’s Rights, <http://www.aclu.org/immigrants-rights/arizona-immigration-law-threatens-civil-rights-and-public-safety-says-aclu>(accessed April 1, 2012).

⁴⁷ Ibid.

⁴⁸ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2.

⁴⁹ Jan Brewer, “Statement by Governor Jan Brewer.”

⁵⁰ Ibid.

instances, the federal government is permitted to use race as one of several factors in immigration enforcement, along with national origin and other proxies for race including style of dress and accent.⁵¹ Therefore, working within the bounds of federal law should not actually prevent Arizona from racial profiling.

While this serves as evidence that state legislation may lead to racial discrimination, it also demonstrates that such discrimination also happens on a national level. When the federal government criminalized hiring undocumented workers in the Immigration Reform and Control Act (IRCA), the law led to extensive discrimination against legal workers.⁵² McKanders uses that experience to argue that only the federal government should wield that level of control, but others view it as an indicator that Washington should not be considered a constant protector of individual rights, especially in the field of immigration. Explicitly discriminatory immigration policies were the norm until the 1950s, and the national origins quota system was not abolished until 1965 – a year after the Civil Rights Act.⁵³

Even today, scholars note that “[i]mmigration and civil rights laws are not easy companions.”⁵⁴ Since immigration law necessarily discriminates on the basis of national origin and citizenship status, it does not always interact nicely with constitutional rights. Stumpf points to a particularly telling anecdote of how this tension presents itself in Title

⁵¹ Gabriel Chin et al., “A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070,” *Georgetown Immigration Law Journal* 25 (2010): 67-

68, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440 (accessed January 4, 2012).

⁵² McKanders, “Welcome to Hazleton,” 136.

⁵³ Huntington, “Constitutional Dimension.”

⁵⁴ Juliet Stumpf and Bruce Friedman, “Advancing Civil Rights through Immigration Law: One Step Forward, Two Steps Back?” *NYU Journal Legislative and Public Policy* 6 (2002-2003): 133, http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_060672.pdf (accessed March 16, 2012).

8 of the United States Code which holds most of the nation's immigration law: "[t]he sections under the heading 'Civil Rights' have been transferred to other sections or repealed."⁵⁵

The fact that discrimination exists on the national level does not mean state legislation will solve the problem. Victor Romero, a specialist in immigrant and minority rights, rejects the claim that devolution will necessarily solve the problem "if racism within immigration law and policy is systemic."⁵⁶ Instead of declaring one level of government more dangerous than others, the best solution is likely to regard all immigration laws as potentially suspect. Concerns about discrimination are insufficient to restrict immigration law to one or another government, so other criteria must be examined to determine the proper allocation of authority.

Federal Inaction versus Uniformity

Another argument in support of state regulation is that the federal government has failed to properly manage immigration, creating an "unfunded mandate" as states are forced to deal with the consequences.⁵⁷ Ironically, these claims continue despite the fact that immigration enforcement has become increasingly aggressive in the past few years. President Obama has increased the number of removals since he took office from a total

⁵⁵ Stumpf, "Advancing Civil Rights," 133.

⁵⁶ Victor Romero, "Devolution and Discrimination," *New York University Annual Survey of American Law* 58 (2002): 381-385
http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__annual_survey_of_american_law/documents/documents/ecm_pro_065056.pdf (accessed April 1, 2012).

⁵⁷ Gary Nelson, "Mesa Mayor Calls Immigration Law 'unfunded Mandate'," *Arizona Republic*, May 20, 2010.
<http://www.azcentral.com/community/mesa/articles/2010/05/20/20100520mesa-mayor-immigration.html> (accessed March 15, 2012).

of 264,000 in 2008 to 319,000 in 2011.⁵⁸ These actions have not been sufficient to stem the tide of criticism aimed at national officials – especially since Congress has failed to pass comprehensive immigration legislation since IRCA, which focused exclusively on employment.

This argument is not new. In 1994, the same year Proposition 187 was passed, Spiro proclaimed that “[a]s a practical matter, immigration is now largely a state-level concern.”⁵⁹ He believed that certain individual states suffer greater negative externalities from immigration than the country as a whole. If the federal government has less incentive to act, it will not sufficiently control the tide of immigration. Governor Wilson cited deficient federal action when California enacted Proposition 187. Sixteen years later, Governor Brewer’s remarks in Arizona noted that “decades of federal inaction and misguided policy have created a dangerous and unacceptable situation.”⁶⁰

The ineffectiveness of the national government is often used to justify introducing federalism principles into the realm of immigration law. Within this framework, state and national governments each have authority over certain areas, and the federal government still reigns supreme within its domains. Federalism would not permit states to regulate every area of immigration, only those which – like employment and welfare – traditionally fall under state powers.

⁵⁸ “Removal Statistics,” Immigration and Customs Enforcement, <http://www.ice.gov/removal-statistics/> (accessed March 29, 2012).

⁵⁹ Peter J. Spiro, “The States and Immigration in an Era of Demi-Sovereignities,” *Virginia Journal of International Law* 35 (1994-1995), 121, <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/vajint35&div=14&id=&page=> (accessed July 20, 2011).

⁶⁰ Jan Brewer, “Statement by Governor Jan Brewer.”

According to Rodriguez, the existence of sub-federal legislation is not merely a consequence of inadequate federal legislation. She argues that it “reflects the *unsuitability* of a strictly federal response to immigration.”⁶¹ State and local laws are a necessary part of regulating immigration in the United States and the federal government’s inability to create comprehensive reform is due in part to this insufficiency. Regardless of whether they are a symptom of a structural problem or a political one, sub-national immigration laws are unlikely to disappear in the near future. Therefore, it is imperative that a system which harnesses the positive characteristics of such legislation is adopted.

Not all aspects of immigration authority should be decentralized, however. While states should be granted greater discretion, certain policies must remain at the federal level. In particular, since foreign relations are still frequently implicated by pure immigration law, the federal government must have control over it. This mentality was seen when Justice Miller worried in *Chy Lung* about the possibility that an individual state could subject the entire country to difficulties because of its immigration policy.⁶² The argument that the United States must speak “with one voice” in contact with foreign nations is compelling.⁶³ A coherent and cohesive policy over pure immigration law protects the country from the whims of an individual state.

But Spiro claims that in the modern world, one voice is no longer necessary. He believes that most foreign governments understand American government well enough that they “are now more likely to retaliate directly against the offending state alone rather

⁶¹ Rodriguez, “Significance of the Local,” 580.

⁶² 92 U.S. 275, 280 (1875).

⁶³ McKanders, “Welcome to Hazleton,” 138.

than against the United States as an undifferentiated unit.”⁶⁴ Spiro’s hypothesis has somewhat borne out in recent years. After the passage of SB 1070, Mexico’s Foreign Secretary Patricia Espinosa spoke for the government of Mexico, stating that SB 1070 “forces the Mexican government to reconsider the viability and utility of the cooperation programs that have been developed with Arizona.”⁶⁵

On the other hand, Mexico has also responded to the United States as a whole. In an amicus curiae brief submitted to the Ninth Circuit Court of Appeals in *United States v. Arizona*, one of Mexico’s major concerns was that “SB 1070 dangerously leads to a patchwork of immigration laws that impede effective and consistent diplomatic relations.”⁶⁶ The brief expresses concern that Mexican-American “sovereign-to-sovereign” relations will be damaged by inconsistent American immigration policy.⁶⁷ It even quotes James Madison in Federalist 42, saying “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁶⁸

While Mexico may be able to adapt its policies in response to a single state law like SB 1070, the country appears unwilling to embrace the resulting patchwork throughout the entire United States. Other countries with weaker ties to the United States are even less likely to regard each state as a sovereign in regards to immigration policy. Beyond concerns about the actions of a single state, the federal government should also

⁶⁴ Spiro, “Demi-Sovereignities,” 122

⁶⁵ “Remarks by Foreign Secretary Patricia Espinosa On the Signing of Arizona Law Sb 1070 “support Our Law Enforcement and Safe Neighborhood Act”,” Secretaria de Relaciones Exteriores, http://portal3.sre.gob.mx/english/index.php?option=com_content&task=view&id=529&Itemid=9 (accessed March 25, 2012).

⁶⁶ Brief of Amicus Curiae United Mexican States in Support of Plaintiff-Appellee, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 3.

⁶⁷ *Ibid*, 1.

⁶⁸ *Ibid*, 17.

worry about the consequences of several states acting in concert. If five states pass anti-alien legislation, national consequences may be small. But if over 50 percent of the country enacts a law, it may begin to appear that the nation is speaking with one voice – just not the voice of the President. Given the potential for foreign policy consequences, the national security rationale behind the plenary power still stands and the President and Congress should continue to control entrance and abode.

This control can be maintained even without the plenary power doctrine. As Huntington points out, Congress' existing corpus of pure immigration law "has already precluded a role for states and localities in immigration law *qua* immigration law."⁶⁹ The existing immigration scheme is likely to hold up as a statutory preemption against similar state enforcement. In 2000, the Supreme Court unanimously struck down a Massachusetts law which banned the purchase of goods from companies who did business with Burma.⁷⁰ The Court found it unconstitutional on narrow grounds, stating that it was preempted by existing federal sanctions. A similar verdict would likely emerge if the Court no longer relied on the plenary power, thus preserving necessary uniformity for pure immigration law.

A Theoretical Framework

After analyzing the arguments on both sides, it is clear that immigration federalism has both major benefits and significant risks. However, as previously indicated, a system predicated on the plenary power has its own dangers. An appropriate

⁶⁹ Huntington, "Constitutional Dimension," 831.

⁷⁰ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

scheme must balance experimentation against civil rights and inaction against uniformity at all levels of government. There are several components which, based on this analysis, must be present in any successful overhaul of the legal backdrop to immigration legislation.

First, states should be constrained from placing undue burdens on the rest of the United States. In order to avoid a race to the bottom, the federal government must retain control over entrance and abode. Determining who may enter the country and under what circumstances they can be removed is necessarily bound up in national sovereignty. The plenary power is not necessary to maintaining this authority. The current federal scheme codified in the INA is likely sufficient to maintain federal control of “pure” immigration law. States could then enact sub-national regulation in other areas like employment and welfare, except in cases of statutory preemption.

Next, all levels of government must be held accountable for violating the equal protection rights of both legal and illegal aliens via the Fourteenth Amendment and the Due Process Clause. Whereas PRWORA unofficially devolved judicial deference to the states, an ideal scheme would require both federal and sub-federal laws to conform to judicial scrutiny. After all, if immigrants truly are “discrete and insular”⁷¹ minorities, they continue to be so regardless of the size of the government. *Graham* originally prohibited state discrimination against legal immigrants in welfare cases. With this level of scrutiny, most laws which separate out legal immigrants will be struck down on a Fourteenth

⁷¹ *Graham v. Richardson*, 403 U.S. 365 (1971).

Amendment challenge.⁷² Undocumented aliens would have fewer protections, but the current scheme already leaves them at risk because they lack authority to be in the country at all. Protections for illegal immigrants would largely need to be created by statute, which is more likely to occur at the sub-federal level, as it has with sanctuary cities.

Third, allowing federalism into immigration law might weaken the current standstill on new immigration legislation. The lack of protection for undocumented aliens might jumpstart Congressional legislation to statutorily preempt undesirable state laws instead of relying on the plenary power to void them. Sub-national governments who feel current immigration policy is detrimental to their constituents would be able to enact regulations to counter the negative impact. Smaller governments often function more quickly, allowing a better response to changing needs than at the national level. Moreover, states could tailor their immigration policies to particular labor needs within their borders.⁷³

Finally, any appropriate scheme must consider the original justification for exclusive federal control – national security and foreign relations. A system with the above features will largely serve these goals. Giving the federal government control over entrance and abode will solve many concerns about uniformity, at least in the context of foreign affairs. It will leave the federal government in charge of border control, which serves a major purpose for national security. Protecting the constitutional rights of legal and illegal aliens will benefit the United States' external relationships with other

⁷² Spiro, "Demi-Sovereignities," 154.

⁷³ Huntington, "Constitutional Dimension," 832.

sovereign nations. If states do enact anti-immigrant laws, they will at least be constrained by the equal protection clause.

Federalism can be applied successfully to immigration, especially in the realm of so-called “alienage law.” Concerns about individual rights and the need for uniformity are important, but they are not antithetical to power-sharing between multiple levels of government. If a new regulatory scheme commits to protecting civil rights and maintaining some level of uniformity in immigration policy, it can succeed.

Chapter 4: The Revolution of the Plenary Power, Part 2 — Practical Applications

Often, the debate over immigration is framed as an all-or-nothing proposition: either the states can run roughshod over immigrant's rights or they must be shut out of legislation entirely. The Justice Department's brief in *United States v. Arizona* relies on this idea; the plenary power as applied in the brief structurally preempts any law which can be connected to immigration. Given the current domestication of immigration law, the plenary power can even be used to argue against many alienage statutes. However, according to *De Canas*, which upheld a California employment statute, subfederal laws are only preempted in cases where the national government has "occupied the field" sufficiently to preclude other regulations.¹ If immigration law is the sole province of the federal government, then the current scheme of federal legislation counts as a "complete ouster" of state regulation – a convenient argument when the Executive Branch disagrees with the laws in question.²

But this is a false dichotomy. While determining the exact boundaries of a new, shared authority of immigration law is beyond the scope of this analysis, it is clear that the proper approach will be significantly more nuanced. The theoretical requirements outlined in Chapter III provide a strong starting point for developing such a system.

¹ *De Canas v. Bica*, 424 U.S. 351, 363 (1976).

² At a naturalization ceremony in April 2010, President Barack Obama stated that SB 1070 had the power "to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe." Randal Archibold, "Arizona Enacts Stringent Law On Immigration," *New York Times*, April 23, 2010, <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> (accessed April 7, 2012).

Giving states some control over immigration law does not require granting them license to enact unrestrained legislation.

If legislators and jurists conduct a proper analysis and balance competing desires for innovation, fairness, action, and security, an appropriate division of power can be found. Applying such a framework would even overturn some of the controversial provisions of SB 1070. The plenary power is not the only defense against undesirable and potentially dangerous state policy, though moving away from assumed preemption does expose some of the weaknesses of the current legal system which must be remedied by Congress. For the most part, however, since states can only regulate in areas which are constitutionally appropriate, and are still subject to express statutory preemption by the federal government, state legislation is necessarily limited even without the plenary power doctrine. This restraint can be demonstrated by a step-by-step analysis of how a court, using an immigration federalism framework, would consider controversial provisions in SB 1070.

Applying the Framework to S.B. 1070

Section 1:

If a court were adopt this framework, Section 1 of SB 1070 – which establishes the law’s intent to encourage “attrition through enforcement”³ – would not draw skepticism because it would be acceptable for Arizona to set a “public policy of all state and local government agencies.”⁴ While such a court would likely accept Arizona’s

³ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 1.

⁴ Ibid.

intent, it would also obviously agree with the Ninth Circuit opinion in *United States v. Arizona* that “Section 1 has no operative function”⁵ and therefore is irrelevant to enjoining the law. Instead, it serves as a purpose statement which should guide the court’s consideration of the rest of the statute.

Such a court would also likely agree that Arizona has a compelling state interest in limiting illegal immigration into the state. It is difficult to argue that the state of Arizona does not suffer negative consequences from immigration. According to Carol Swain, a professor of Political Science and Law at Vanderbilt University, the law is intended to protect Arizonans from “excessive crime, homelessness, and high unemployment made worse by the uncontrolled influx of illegal aliens.”⁶ Swain also points out that Phoenix, Arizona has previously been called “the kidnapping capital of America.”⁷ Concerns for public safety would likely be judged an appropriate and legitimate state interest. Given Arizona’s disproportionate share of consequences from immigration, a federalism model would grant the state some authority to combat the issues that arise.

Section 2:

Section 2(A), which mandates that “no official or agency... may adopt a policy that limits or restricts the enforcement of federal immigration laws”⁸ is also permissible

⁵ *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010), 13.

⁶ Carol Swain, “Why the Court Should uphold S.B. 1070,” SCOTUSblog, entry posted July 14, 2011, <http://www.scotusblog.com/2011/07/why-the-court-should-uphold-s-b-1070/> (accessed July 15, 2012).

⁷ Ibid.

⁸ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2(A).

in both the hypothetical court and the Ninth Circuit's opinion.⁹ Since the section merely requires full compliance with existing federal laws, it cannot be preempted by existing federal statutes. The primary aim of this section is to prevent sanctuary cities, which are inconsistent with provisions in federal immigration law.

Section 2(B) is substantially more controversial. The provision requires that whenever a "reasonable suspicion exists" about a person's legal status during "any lawful stop, detention, or arrest," law enforcement officials must make a "reasonable attempt... when practicable" to discover their immigration status.¹⁰ It also requires that officials determine the legal status of "any person who is arrested" before their release.¹¹ Since it involves police activity, Section 2(B) definitely falls within the law enforcement authority of the state of Arizona. It is also certainly aimed at the legitimate state interest of protecting Arizonans from the costs associated with immigration.

Regardless, this provision would likely be held unconstitutional because it potentially infringes on the rights of legal immigrants. The equal protection clause has not been invoked in *United States v. Arizona* because the controversial provisions, including Section 2(B), have been enjoined and officers have not yet begun this procedure. If the provision was found constitutional, legal aliens and American citizens would almost certainly argue that the laws were enforced through discriminatory measures. Some organizations have already attempted to make equal protection claims

⁹ *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010), 3.

¹⁰ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2(B).

¹¹ *Ibid.*

against the law.¹² Ideally, these equal protection arguments would be treated with heightened scrutiny, and the law would be overturned (assuming it is applied in a discriminatory manner).

Additionally, a court could overturn Section 2(B) based on the foreign relations precedent established in *Hines v. Davidowitz* in 1941.¹³ *Hines* involved an alien registration scheme developed by the State of Pennsylvania in the late 1930s which the Court declared unconstitutional. Writing for the majority, Justice Black deliberately left open the question of whether the federal government had exclusive control over immigration. Black focused instead on the nation's sovereign role in foreign affairs and "the protection of the just rights of a country's own nationals when those nationals are in another country."¹⁴ According to *Hines*, the federal government has a vested interest in protecting legal aliens "from the possibility of inquisitorial practices and police surveillance that might... affect our international relations."¹⁵

A major fear was that the Pennsylvania registration scheme would lead to harassment of legal aliens by state officials. Section 2(B) engenders similar concerns, especially given the response from Mexico after Arizona passed the law.¹⁶ Based on *Hines*, SB 1070 could be found unconstitutional because of its impact on legal residents

¹² *Escobar v. Brewer*, No. 10-00249 (D. Ariz. dismissed Aug. 31, 2010); *Frisancho v. Brewer*, No. 10-00926 (D. Ariz. dismissed Aug. 24, 2010).

¹³ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹⁴ 312 U.S. 52, 64 (1941).

¹⁵ 312 U.S. 52, 74 (1941).

¹⁶ Remarks by Foreign Secretary Patricia Espinosa On the Signing of Arizona Law Sb 1070 "support Our Law Enforcement and Safe Neighborhood Act", Secretaria de Relaciones Exteriores, http://portal3.sre.gob.mx/english/index.php?option=com_content&task=view&id=529&Itemid=9 (accessed March 25, 2012).

(and consequently foreign affairs). The Ninth Circuit also referred to *Hines* in its decision to enjoin Section 2(B).¹⁷

Subsections C-L, which involve cooperation with federal immigration officials, were not enjoined by the Ninth Circuit and would likely be permissible under a federalism scheme.¹⁸ This includes Section 2 (H) which permits any legal resident of Arizona to sue “any official or agency... that adopts or implements a policy that limits or restricts enforcement of federal immigration laws... to less than the full extent permitted by federal law.”¹⁹

While Governor Brewer often argues that SB 1070 “mirrors federal law,”²⁰ Section 2(H) has no corresponding provision in federal law since it applies directly to state and local officials. The Ninth Circuit opinion does not provide a justification for leaving this section untouched, but it should succeed in a federalism scheme. After all, Arizona should be free to create state standards for its law enforcement agencies and officials.

Section 2(H) reveals the need for additional legislation at the federal level. The Department of Justice argues that the provision cannot stand because it eliminates officials’ discretion under the current scheme.²¹ This argument is unconvincing, however, because discretion is not built into federal immigration statutes. Since discretion does not exist within the statute, the Department of Justice cannot compel Arizona to allow it.

¹⁷ *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010), 14-20.

¹⁸ 702 F. Supp. 980 (D. Ariz. 2010), 3.

¹⁹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 2(H).

²⁰ “Arizona’s ‘Papers Please’ Law,” Factcheck.org, <http://www.factcheck.org/2010/06/arizonas-papers-please-law/> (accessed April 17, 2012).

²¹ Complaint, *United States v. Arizona*, 702 F. Supp. 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), 17.

If immigration authority were shared between federal and subnational governments, states could force their own officials to enforce certain sections of Congressional legislation which federal agencies currently ignore. Optimistically, this might force immigration reform through Congress once agencies are overwhelmed by states' requests – though admittedly this may be asking too much of the current legislature.

Section 3:

Section 3 of SB 1070 effectively creates a state crime called “willful failure to complete or carry an alien registration document” based on the federal registration scheme outlined in 8 U.S. Code 1304(e) and 1306(a).²² Anyone who violates those provisions of the U.S. Code in Arizona commits a Class 1 misdemeanor, with a maximum fine of one hundred dollars and twenty days in jail.²³ Once again, this portion of SB 1070 cannot stand because of precedent established in *Hines v. Davidowitz*. In that case, Justice Black determined that the national alien registration scheme was so comprehensive that sub-federal legislation was necessarily preempted.²⁴ Alien registration is intimately tied to entrance and abode, and is thus an area which still requires the country to speak with “one voice.”²⁵ Therefore, Section 3 would not be permitted to stand even if Arizona were granted more control over some areas of

²² Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 3(A).

²³ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 3(H).

²⁴ 312 U.S. 52, 64 (1941).

²⁵ Karla M. McKanders, “Welcome to Hazleton! ‘Illegal’ Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It,” *Loyola University Chicago Law Journal* 39, no. 1 (2007), 136, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407727.

immigration law because states would still have no control over the domain of pure immigration law

Section 5:

Sections 5(A) and 5(B), on the other hand, fall well within the realm of appropriate state and local legislation. The provisions make it illegal for a driver to pick up day laborers, and for day laborers to enter a vehicle for work “if the motor vehicle blocks or impedes the normal movement of traffic.”²⁶ In effect, Sections 5(A) and 5(B) are traffic regulations, and cannot be preempted by the federal government even though it clearly intends to impact immigrant laborers.

Section 5(C) is substantially more controversial, and it is unclear whether or not it would succeed. This section makes it a crime for an undocumented immigrant to “knowing apply for work, solicit work in a public place, or perform work as an employee or independent contractor in [Arizona].”²⁷ This provision could either be upheld or struck down depending on the court’s determination of the appropriate place of the IRCA.

On the one hand, Section 5(C) regulates employment and is therefore in an area of traditional state authority. *De Canas* determined that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the state.”²⁸ It is possible that by embracing federalism in the arena of immigration law, provisions like Section 5(C) would be embraced as an appropriate use of state police powers – much like the California statute in *De Canas* was originally viewed.

²⁶ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 5(A-B).

²⁷ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 3(C).

²⁸ *De Canas*, 424 U.S. 351, 356 (1976).

A court formulating a new framework to consider SB 1070 might embrace IRCA preemption even if such an approach is not logically consistent with the desire to allow state legislation. On the other hand, it might accept the federal government's argument that the IRCA preempts this provision because the legislation does not punish undocumented workers for seeking employment. Previously, the Supreme Court has agreed that "[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn."²⁹ Therefore, a court could decide that this provision is expressly preempted by the scheme established in IRCA. This ambiguity obviously does not exist in the Ninth Circuit's opinion, which did enjoin Section 5(C) as preempted by IRCA.³⁰

Section 6:

Section 6 amends Arizona law to permit warrantless arrests for several categories of offenses if the officer has "probable cause to believe" the arrestee has committed the offense.³¹ This section allows a warrantless arrest if "the person to be arrested has committed any public offense that makes the person removable from the United States."³² The statute has been criticized for a lack of clarity, since warrantless arrest is already permitted if there is probable cause to believe the person has committed a felony, misdemeanor, or petty offense.³³ The Ninth Circuit opinion states that both the United States and Arizona have interpreted the provision to permit

²⁹ *P.R. Department of Consumer Affairs v. Isla Petroleum Corporation*, 485 U.S. 495, 503 (1988).

³⁰ 702 F. Supp. 980 (D. Ariz. 2010), 27.

³¹ Support Our Law Enforcement and Safe Neighborhoods Act, *Arizona Revised Statutes* (2010), § 6.

³² *Ibid*, § 6(A)(1).

³³ *Ibid*, § 6(A).

“warrantless arrest of a person where there is probable cause to believe the person has *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States.”³⁴

Assuming this interpretation of the statute, its enforcement becomes problematic. It requires ordinary law enforcement officers to be familiar enough with both out-of-state laws to determine whether or not a particular crime would be considered a crime in Arizona. Next, it requires officials to be familiar with all crimes which make a person “subject to removal.” Given the complexity of the INA, this is not an easy task. Though the law does not technically require law enforcement officials to act outside of their police powers, the complexity of this determination would almost assuredly lead to harassment of residents whose entrance and abode has been sanctioned by the federal government. Section 6 would likely be declared unconstitutional based on *Hines* precedent, or later because of equal protection concerns.

Possible Implications:

This analysis does not intend to predict exactly how a system of shared legal authority should be implemented. In areas like Section 5, it is nearly impossible to predict how a court would weigh ideology against established precedents. Abandoning precedent and overturning the supremacy of a law like IRCA could create a host of problems which must be weighed against the benefits of immigration federalism.

³⁴ 702 F. Supp. 980 (D. Ariz. 2010), 31.

Despite its ambiguities, the intention of the analysis is to refute the belief that opening up immigration law to state and local governments would create a free-for-all and permit states to enact any form of legislation they desire. Instead, courts would be able to consider existing precedent, as well as the competing values which need to be reconciled. Properly administered, immigration federalism would require a determination of the appropriate role of each level of government.

For example, arguments against Sections 3 and 6 of S.B. 1070 are strengthened by the claim that they are intimately tied to entrance and abode – which is necessarily controlled by the federal government because of the connection between pure immigration law and foreign affairs. State laws which have the potential to create serious hindrances for foreign nationals, especially those which have a racial component, will still be considered inappropriate regulation.

Additionally, existing precedent can still play a large role in judicial considerations. If immigration federalism is embraced, justices are unlikely to quote *Chae Chan Ping*, which established the plenary power,³⁵ but they will definitely continue to consider *Hines v. Davidowitz* and other modern cases.³⁶ Courts could also turn to earlier 19th century precedent such as *Henderson v. Mayor of New York* if the federal government decides to return to a Commerce Clause justification.³⁷ In fact, it may be possible for justices to effectively overcome the plenary power doctrine simply by

³⁵ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

³⁶ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

³⁷ *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875).

referring to *Henderson* and other cases which cite the foreign commerce power rather than plenary power cases.

The analysis also demonstrated a weakness in the existing federal immigration regulatory scheme. The Department of Justice brief in *United States v. Arizona* effectively admits that the laws as written would create an impossible workload for immigration enforcement agencies. One of their arguments against Section 2(B) S.B. 1070 is that

“...it will impose significant and counterproductive burdens on federal agencies charged with enforcing the national immigration scheme, diverting resources and attention from the dangerous aliens who the federal government targets as its top enforcement priority.”³⁸

The Justice Department’s concern that the state law could overwhelm the agency by mandating an increased number of permissible requests reveals a major issue. It appears to indicate that federal statutes, as they are written, are only manageable because the government chooses not to enforce them fully. If this level of discretion is necessary to the integrity of the system, it must be built into the laws as they are written by Congress.

The inadequacies of existing federal law do not provide a strong enough argument to counter the issues with the plenary power established earlier in this paper, but they do reveal that some statutory changes are necessary once the federal government must

³⁸ Complaint, 702 F. Supp. 980 (D. Ariz. 2010), 3.

handle concurrent legislation. In fact, one benefit of shared regulation may be that it forces all levels of government to clarify the intentions of the law.

Finally, it is worth noting that bad public policy is not inherently unconstitutional. Ilya Shapiro at the Cato Institute, who believes that S.B. 1070 is in large part constitutional, reminds readers that “a law’s constitutionality is... not synonymous with its wisdom.”³⁹ It is important to remember that laws should not be found unconstitutional merely because they are bad policy. Therefore, even if a framework of shared authority did lead a court to declare S.B. 1070 constitutional, it does not mean that the ideological framework has failed. It merely means that Arizona legislators have create an unwise law which is well-structured enough to pass constitutional muster.

It is clear that accepting a new scheme of immigration regulation will not be easy. The process will likely be complicated and require substantial effort from legislators and jurists to carve out the exact boundaries of this shared authority. If properly applied, however, immigration federalism can still protect against unconstitutional laws by relying on explicit statutory preemption and legitimate precedent, rather than on the shaky and dangerous skeletal remains of the plenary power.

³⁹ Ilya Shapiro, “S.B. 1070: Constitutional but Bad Policy,” SCOTUSblog, entry posted July 13, 2010, <https://www.scotusblog.com/2011/07/s-b-1070-constitutional-but-bad-policy/> (accessed July 15, 2011).

Conclusion

In 1954, the Supreme Court once again addressed the discretion of the federal government in *Galvan v. Press*. The case involved a section of the Internal Security Act which permitted the deportation of aliens who were Communist Party members at any point during their residence in the United States.¹ The Court sided with the government due to the extensive power of the nation to regulate immigration.

But in the Court's opinion, Justice Frankfurter conceded that extensive federal authority was not necessarily ideal. He admitted "much could be said for the view, were [they] writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress."² In the context of *Galvan*, Frankfurter questioned whether or not the ex post facto clause should apply to and invalidate the deportation statute. Ultimately, however, he determined that regardless of his opinion,

"the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume... [T]hat the formulation of these policies is entrusted exclusively to Congress has become

¹ *Galvan v. Press*, 347 U.S. 522, 523 (1954).

² 347 U.S. 522, 531 (1954).

about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”³

Frankfurter was unwilling to abandon the plenary power, even though he questioned its legitimacy, because its foundations were so deeply entrenched in the case of deportation.

Frankfurter went further in his concurrence in *Harisiades v. Shaughnessy* which also involved the Internal Security Act.⁴ In a concurring opinion, Frankfurter claimed that even if immigration law has been “based... in part on discredited racial theories, [and] whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.”⁵ This opinion admits a lack of concern for the rights of individual aliens. If immigration is a question of national security and foreign affairs, even a skeptical Supreme Court cannot intervene.

Galvan v. Press reveals that as the plenary power grows older, it becomes more difficult to uproot. The 1954 Supreme Court neglected to protect the constitutional rights of aliens in order to maintain the status quo. Frankfurter was forced to acknowledge the supremacy of the federal government because of almost a century of precedent. This authority was established in *Fong Yue Ting*, one of the original plenary power cases in the 1890s.⁶ Even though *Fong Yue Ting* was decided with vocal opposition from four justices, a hundred years later it is nearly impossible to distinguish the plenary power

³ 347 U.S. 522, 531 (1954).

⁴ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

⁵ 342 U.S. 580, 597 (1952).

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from deportation. Frankfurter's opinion in *Galvan* reveals that plenary federal authority is likely a permanent feature in the realm of entrance and abode.

The domestication of immigration law, however, is a fairly new phenomenon dating back to the 1970s. The devolution of discretion to the states, a particularly expansive trend, only began in 1996 with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Domesticated immigration law, as seen in welfare and employment statutes, is quickly evolving into more than a mere "page of history." In order for aggressive and outdated federal authority to be shut out of the domestic areas of immigration law, action must be taken immediately. If a new framework for immigration federalism is not adopted, we run the risk of unlimited federal control over the day-to-day lives of legal and illegal aliens. The ever-expanding plenary power will soon reach a point where it cannot be reversed. Without a change, it is likely that the Supreme Court of 2032 will be lamenting the lack of a "clean slate" in domesticated immigration law.

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